



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

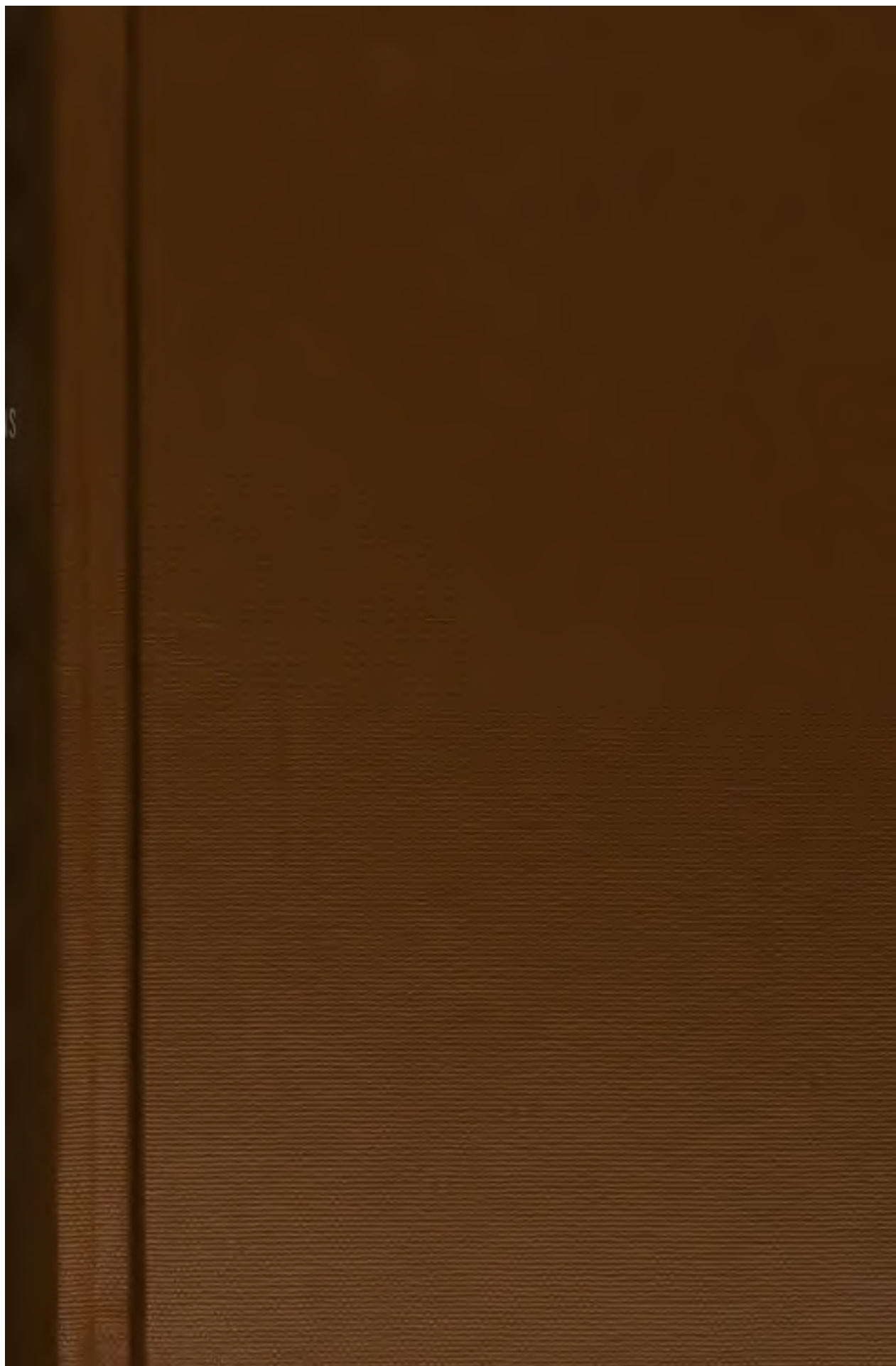
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

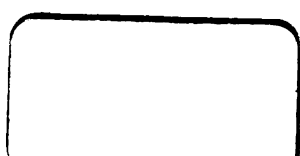
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





A TREATISE *Copy 2*
ON THE LAW
OF
PRIVATE CORPORATIONS.

BY
VICTOR MORAWETZ.

//

SECOND EDITION.

VOL. II.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1886.

**LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY.**

Q 28933

Copyright, 1886,.

BY VICTOR MORAWETZ.

**UNIVERSITY PRESS:
JOHN WILSON AND SON, CAMBRIDGE.**

TABLE OF CONTENTS.

VOLUME II

CHAPTER VIII.

THE VALIDITY OF CORPORATE ACTS.

	SECTION
PART I. The Responsibility of a Corporation for the Acts of its Agents	577
II. The Responsibility of a Corporation for the Acts of the Majority	641
III. The Legal Effect of Common Law and Statutory Prohibitions. — General Principles	648
A. The Effect of Common Law and Statutory Rules	655
B. Specific Performance of an unauthorized Corporate Act cannot be enforced	681
C. Unauthorized Contracts of a Corporation are Voidable while unperformed	685
D. The Rights of Innocent Parties	686
E. The Validity of Contracts which have been executed on either Side	689
F. The Validity of Transfers of Property	707
G. Obligations resulting from the Performance of Void Contracts	714
H. The Liability of a Corporation for Torts	725

CHAPTER IX.

THE LEGAL CONSEQUENCES OF THE FORMATION OF A CORPORATION WITHOUT AUTHORITY OF LAW	735
---	-----

CHAPTER X.

THE RIGHTS OF CREDITORS.

	SECTION
PART I. The Rights of Creditors of a Corporation with Respect to its Capital	779
II. The Rights of Creditors against Shareholders with Respect to the Company's Capital	818
III. Rights of Creditors against Shareholders under special Statutory Provisions	869
IV. Rights of Creditors against Directors under special Statutory Provisions	906

CHAPTER XL

FRANCHISES	922
----------------------	-----

CHAPTER XII.

CONSOLIDATION OF CORPORATIONS	939
---	-----

CHAPTER XIII.

FOREIGN CORPORATIONS	958
--------------------------------	-----

CHAPTER XIV.

LOSS OF THE CORPORATE FRANCHISES, AND DISSOLUTION OF CORPORATIONS.

Dissolution of Corporations	1002
Jurisdiction in Equity over Corporations	1039

TABLE OF CONTENTS.

vii

CHAPTER XV.

LEGISLATIVE CONTROL OVER PRIVATE CORPORATIONS.

PART I.	The Constitutionality of Legislation affecting Private Corporations	SECTION 1044
II.	The Effect of a Reservation of Power to repeal or alter a Charter	1053

CHAPTER XVI.

DUTIES OF CORPORATIONS WHICH HAVE RECEIVED STATE AID	1114
---	-------------

INDEX	PAGE 1103
------------------------	----------------------

THE LAW OF PRIVATE CORPORATIONS.

CHAPTER VIII.

THE VALIDITY OF CORPORATE ACTS.

§ 575. **Introductory Remarks.** — In order to determine the legal effect of an act ostensibly performed by a corporation, or by an agent acting on its behalf, it is often necessary to consider the application of a number of distinct principles of law.

Corporations almost invariably act through agents. There are few acts which a corporation aggregate can possibly perform without the intervention of an agency of some kind.¹ It becomes necessary, therefore, in almost every instance in which the legal effect of a corporate act is in question, to consider the application of the doctrines of the law of agency.

The principles of the law of agency apply to corporations and to individuals alike. The general rule is, that a corporation as well as an individual, is responsible only for such acts as are performed by its agents in pursuance of the authority granted them. But this general rule is subject to important qualifications. It is well settled that a principal may be estopped, as against a person dealing with his agent in good faith, from denying the authority of the agent to bind him by an act within the scope of the agent's apparent powers. A principal may also become responsible for an unauthorized act of his agent, by ratifying the act after it has

¹ Even the shareholders at corporate meetings can bind the association by their vote only by virtue of an implied delegation to the majority of power to represent the whole association. See *infra*, §§ 641-647.

been performed. The exceptions to the rule, as well as the rule itself, are elementary doctrines of the law of agency, and are applicable to corporations and to individuals alike.

§ 576. Assuming that a corporation has in fact performed an act, or is responsible for the act upon the principles of agency, it becomes necessary to consider to what extent the validity of the act is affected by other rules of the common law, or by statutory enactments. The general rules of law relating to contracts and property rights apply to corporations as well as to individuals. Thus, a corporation is bound by the general laws relating to transfers of property, the usury laws, the statute of frauds, and the rules relating to the interpretation of contracts. A corporation is also subject to the law of torts and nuisances, to the same extent as an individual.

It has been pointed out, that the common law prohibits the unauthorized exercise of corporate powers. In order to determine the legal effect of a corporate act performed by an association in excess of the powers authorized by its charter or by statute, it is therefore necessary to consider the effect of this common law prohibition; and if an act is not merely unauthorized, but in violation of some legislative enactment, it is necessary to consider the effect of the legislative enactment, as well as of the general common law rule against unauthorized corporate acts.

PART I.

THE RESPONSIBILITY OF A CORPORATION FOR THE ACTS OF ITS AGENTS.

A.

§ 577. *Application of the Law of Agency to Corporations.*— It is well settled that the law of agency applies equally to corporations and to individuals. "The result of the cases is, that for acts done by the agents of a corporation, either in

contractu or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances.”¹ “The rule in such cases is, that corporations, like natural persons, are bound, and bound only, by the acts and contracts of their agents, done and made within the scope of their authority.”²

§ 578. The general rule, that a person is not bound as principal by an act performed by another on his behalf, unless authority to perform the act was previously granted to the person acting as agent, must be qualified by two exceptions resting upon distinct principles of law. The first is, that, if an agent is invested by his principal with apparent authority to carry on a certain course of dealing, the principal impliedly consents to be bound to any person who, in good faith, deals with the agent, with the scope of the authority so delegated; and the principal will be estopped from showing that the agent exceeded the authority actually conferred, if the person dealing with the agent had no notice that he acted in violation of his instructions.³ The second exception is, that, after a person has ratified an act performed on his behalf, he will be bound to the same extent as if he had originally authorized the act to be done.⁴ The general rule and the exceptions thereto apply with full force to corporations.

§ 579. **Corporations not bound by unauthorized Acts.**—Corporations must necessarily act through agents; and in all matters involving the exercise of discretion corporations are compelled to depend almost wholly upon the good faith of those whom they have employed to represent them. The important interests which are frequently intrusted to the agents of corporations, and the facility with which this trust can be abused, to the loss of the shareholders, should incline the courts to scrutinize with some degree of strictness any excess of the authority delegated. It is but justice to the shareholders of a corporation to hold that the company shall

¹ *Per* Mr. Justice Campbell, in *&c. Ry. Co. v. James*, 22 Wis. Philadelphia, &c. R. R. Co. *v. Quigley*, 21 How. 202, 210.

² *Infra*, § 585 *et seq.*

³ *Per* Dixon, C. J., in *Chicago*,

⁴ *Infra*, § 618 *et seq.*

not be chargeable with unauthorized acts of its agents, unless a clear reason is shown for holding the contrary.

No authority entitled to respect has ever denied the general rule, that a corporation is not bound by acts performed by its agents in excess of the authority delegated to them. The authorities affirming the general rule are too numerous to be cited; it is recognized in almost every case cited in this chapter.

§ 580. *Acts in Excess of the Charter.*—The powers possessed by the various agents of a corporation may be limited by the terms of their appointment, or by custom; but the ultimate source of their authority is always the agreement of the shareholders, expressed in their charter or articles of association.¹ It follows, therefore, that if an act is in excess of the chartered purposes of a corporation, it will always be outside of the powers delegated to the company's agents, as well as in excess of the corporate powers which the company is authorized by law to exercise.

The general rule, that a contract made by an agent of a corporation in excess of his powers does not bind the company, applies with peculiar force to a contract which is in excess of the charter itself. For a person dealing with a corporation must, at his peril, take notice of the terms of its charter, and of the fact that acts in excess of the charter are necessarily in excess of the authority of the agent performing them.²

If an act or contract is in violation of the charter of a corporation, the company may generally refuse to be bound thereby; first, because the agent who did the act or made the contract exceeded the powers delegated to him; and, secondly, because the doing of the act, or creation of the contract, involved an unauthorized exercise of corporate powers. The application of each of these objections rests upon distinct principles of law, and each has numerous exceptions. They

¹ *Supra*, Chapters VI., VII.

Pearce v. Madison, & Co. R. R. Co.,

² *Alexander v. Cauldwell*, 83 21 How. 441; *Murphy v. City of N. Y.* 480, 485; *Davis v. Old Col- Louisville*, 9 Bush, 189. See *infra*, only *R. R. Co.*, 181 Mass. 258, 260; § 591.

should, therefore, always be considered independently of each other.

§ 581. **Unauthorized Acts do not bind the Corporation because executed.** — In some of the cases it has been said, that, while the general rule is that acts and contracts in excess of the charter of a corporation are *ultra vires*, and therefore not binding upon the company, yet, after a corporation has enjoyed the benefit of an act or contract performed on its behalf, it will be estopped, when charged with responsibility on account of the act or contract, from setting up as a defence that the transaction was *ultra vires*.

This statement of the law is certainly inaccurate. It has never been denied that the principles of the law of agency apply to corporations and to individuals alike, and it is certain that, according to the elementary principles of the law of agency, a person does not become responsible for acts performed in his name merely because these acts have accrued to his benefit. A person may become responsible for an unauthorized act performed on his behalf, by ratifying the act; but ratification would imply an intention to adopt the unauthorized act. Ratification by a corporation of an act in excess of its charter, means ratification by the entire body of shareholders; no agent of a corporation has authority to ratify an act which he had not original authority to do.¹

The fact that a contract in excess of the charter of a corporation is prohibited by law, may not be a reason for holding such contract void, and discharging the corporation from liability after it has enjoyed the benefit of performance by the other party. But the common law prohibition against unauthorized corporate action does not in any manner impair the application of the principles of the law of agency; the application of the principles of the law of agency must be considered without regard to this prohibition. The doctrines of the law of agency are founded on elementary principles of right, and neither practical justice nor the science of the law is furthered by substituting in the place of these principles a purely arbitrary rule.

¹ *Infra*, § 622.

Statements may be found in some of the authorities, to the effect that "the plea of *ultra vires*" should not be allowed to prevail, where it would "accomplish a legal wrong."¹ These statements, however, refer merely to the effect of the legal prohibition against unauthorized corporate acts; they mean that the fact that a transaction is in excess of the charter of a corporation should not be a defence, if there would be a liability according to the general principles of law applicable to unincorporated companies. It certainly cannot be maintained that the application of the established principles of the law of agency would "accomplish a legal wrong."

The forcible remarks made upon this subject by an English judge of the Court of Exchequer are well worth repeating. Bramwell, B., said: "I cannot help adding an observation on the objection made to the honesty of a defence of this description. It is said the company has contracted and the company repudiates its contract. There cannot be a more perfect fallacy. 'Persons without authority have affected to contract for the company, and the company, repudiates the act,' is the true expression. A., B., and C. are in partnership as hatters. A. buys boots in the name of the firm, and the sellers sue A., B., and C., who say they did not contract. It may be wrong in A., but are B. and C. to blame? I do not say the corporation cases are cases of partnership, but the principle is the same."²

§ 582. **Formalities.** — The agents of a corporation must observe all formalities which are required by the company's charter in the corporate transactions. Even the majority are not at liberty to disregard the forms prescribed by the charter, for they constitute a part of the fundamental agreement between the shareholders.³ And if any agent of a corporation

¹ *Railway Co. v. McCarthy*, 96 U. S. 267, *per* Justice Swayne; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378. *v. City of Louisville*, 9 Bush, 189; *Ex parte Williamson*, L. R. 5 Ch. 309; *Dougan's Case*, L. R. 8 Ch. 540.

² *Bateman v. Mayor of Ashton*, 8 H. & N. 840. See also *Pearce v. Madison, &c. R. R. Co.*, 21 How. 441; *Boydton v. Lynn Gas Light Co.*, 124 Mass. 197; *Zottman v. San Francisco*, 20 Cal. 96; *Murphy*

With regard to the liability to account for benefits received under a transaction which does not bind the corporation, see *infra*, § 715 *et seq.*

³ *Supra*, §§ 479, 644.

acts in a manner which is not authorized by the company's charter, his acts will not be binding.

Thus, it has been held that, where the charter of a company requires contracts of a particular description to be in writing, and signed by specified officers, or approved in a specified manner, no agent can bind the company by a contract of that description unless it was executed in the manner prescribed.¹ And if the constitution of a company requires the concurrence of a certain number of directors in the making of a contract, or the doing of any other corporate act, a less number cannot bind the company.²

§ 583. **Formalities in the Appointment of Agents.** — So, where particular formalities are required by the charter to be observed in the appointment of officers or agents, no valid appointment can be made except in conformity with the prescribed rules.³ And the acts of an officer who has not been properly appointed will not be binding upon the company, unless the defect of authority has been cured by a subsequent ratification,⁴ or the company is estopped from showing that the agent had no authority to represent it.⁵

§ 584. **When Disregard of Formalities is not Material.** — Persons dealing with the agents of a corporation in good faith may ordinarily assume that all formalities prescribed by the

¹ *Henning v. U. S. Ins. Co.*, 47 Mo. 425; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Badger v. American, &c. Ins. Co.*, 103 Mass. 244; *Head v. Providence Ins. Co.*, 2 Cranch, 127; *Safford v. Wyckoff*, 4 Hill, 446; *Murphy v. City of Louisville*, 9 Bush, 189; *McCullough v. Moss*, 5 Denio, 567. Compare *Commercial Mut. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318. As to the validity of instruments not under seal, where the charter requires a seal to be used, see *Crampton v. Varna Ry. Co.*, L. R. 7 Ch. 562. Compare *In re General Provident Assur. Co.*, L. R. 14 Eq. 507, 512; and see *supra*, §§ 338-341.

² *Beatty v. Marine Ins. Co.*, 2 Johns. 109; *Gordon v. Preston*, 1 Watts, 385; *Dawes v. North River Ins. Co.*, 7 Cowen, 462; *Ridley v. Plymouth, &c. Baking Co.*, 2 Exch. 711, 718; *Kirk v. Bell*, 16 Q. B. 290; *Card v. Carr*, 1 C. B. N. S. 197. Compare *Thames Haven Dock, &c. Co. v. Rose*, 4 M. & G. 552.

³ *People's Mut. Ins. Co. v. Westcott*, 14 Gray, 440; *Johnston v. Jones*, 23 N. J. Eq. 216; *Macon, &c. R. R. Co. v. Vason*, 57 Ga. 314. See *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

⁴ *Infra*, § 638.

⁵ *Infra*, § 637.

charter, as conditions precedent to the authority of the agents, have been complied with;¹ and an act performed in disregard of a prescribed formality may be ratified by the corporation, and in some instances by its managing agents.² In some instances, also, provisions in a charter prescribing formalities to be observed by the company's agents have been held to be mere directions, the non-observance of which would not impair the authority of the agents to bind the company.³

B.

§ 585. *Qualification of the General Rule that a Principal is not bound by unauthorized Acts.*—The general rule that a principal is not bound by the unauthorized acts of his agents, is subject to an important qualification. A principal who employs an agent in a particular transaction or course of business thereby impliedly invites persons dealing with the agent in that particular transaction or course of business to rely upon the agent's apparent powers, so far as this is essential to render safe dealing with the agent possible; and the principal will be liable to a person so dealing with the agent in good faith, within the scope of his apparent powers, although the

¹ *Infra*, § 610. This doctrine cannot be invoked by those persons who are under an obligation to see to the observance of formalities. Managing agents of a corporation, therefore, cannot as a rule hold the company bound by an informal act, unless it has been ratified by the corporation. See *Ex parte Valpy*, L. R. 7 Ch. 289; *In re Wynn Hall Coal Co.*, L. R. 10 Eq. 515; *In re Native Iron Ore Co.*, L. R. 2 Ch. D. 845; *In re Newcastle Marine Ins. Co.*, 19 Beav. 97, 107. Compare *In re General Provident Assur. Co.*, L. R. 14 Eq. 507; *In re General South Am. Co.*, L. R. 2 Ch. D. 337; *Chambers v. Manchester, &c. Ry. Co.*, 5 B. & S. 588; *Leggett v. New Jersey, &c. Banking Co.*, Saxt. 541;

Lebanon, &c. Gravel Road Co. v. Adair, 85 Ind. 244; *Madison County v. Paxton*, 57 Miss. 701. So, a person who has notice of non-compliance with prescribed formalities is not protected. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548, 565. *Infra*, § 589.

² *Infra*, §§ 618, 684.

³ *Thames Haven Dock, &c. Co. v. Rose*, 4 M. & G. 552; *Deaderick v. Wilson*, 8 Baxter, 108.

A provision that it "shall be lawful" to convey lands of a corporation in a prescribed manner does not exclude other methods of conveyance. *Morris v. Keil*, 20 Minn. 531; *Bason v. Mining Co.*, 90 N. Car. 417.

agent may have transgressed the authority which the principal intended he should exercise. This doctrine was expressed in an elaborate opinion delivered by Davis, J., on behalf of the Court of Appeals of New York, in the following words: "Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."¹

§ 586. *The Principle of the Doctrine.* — The principle of law which underlies this doctrine is generally held to be that of estoppel; but the estoppel in this case is not an ordinary estoppel *in pais*. A technical estoppel involves a representation of a fact, by which an innocent party has been led to alter his position, and the party making the representation is not permitted to deny the existence of the fact represented, if justice requires he should be estopped. The application of the doctrine under consideration, however, does not rest upon any representation of facts by the principal which the principal is estopped from denying. A principal, by employing an agent, merely represents that the agent shall have authority to do certain acts, *under certain circumstances*. The right of a party dealing with the agent to assume the existence of these circumstances is not based upon a representation made by the principal. The representation, if there be any, is made by the agent, and not by the principal.

The liability of a principal in a case of this kind seems properly to rest on an implied agreement. The primary intention of a person who employs an agent is that the agent shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with the agent upon this understanding. If the employment is for a particular transaction, the principal intends that the agent shall have

¹ New York, &c. R. R. Co. v. Schuyler, 34 N. Y. 30, 73; and see the authorities there cited.

such powers as are necessary to carry out the transaction effectively; and if the employment is for a known course of dealing, the intention is that the agent shall be empowered to carry on that course of dealing in the customary manner. But this primary intention would be completely frustrated if persons dealing with the agent were required in every instance to ascertain the existence of the state of facts upon which the agent's real authority to act depends. No one would be willing to deal with the agent if this were required, because it would be impossible to deal with him with safety.

§ 587. *Classes of Cases in which the Doctrine applies.* — The cases in which the doctrine is applicable may be divided into two classes.

First. A person who appoints an agent to represent him in a particular course of business must be held to agree that he will be responsible, to persons dealing with such agent in good faith and without notice, for all such acts of the agent as are *usually* performed in that particular course of business. The reason of this is obvious. If persons dealing with an agent employed to represent the principal in a definite course of business were required to investigate in each particular case whether he had *actual* authority to bind his principal, it would be practically impossible to carry on the business by means of the agent, and the primary object of the agency would be defeated. Hence, it may be stated as a rule, that a party dealing in good faith with an agent, in a transaction which would be within the agent's authority under *ordinary* circumstances, may rely upon the agent's implied representation that the circumstances under which he has authority to bind his principal actually exist. Thus, the cashier of a bank has a general authority to certify checks in carrying on the business of the bank; and a *bona fide* purchaser of a check, certified good by the cashier of the bank upon which it was drawn, is entitled to assume the existence of every fact upon which the cashier's authority to certify that particular check depended.¹

However, this rule is applicable only where the act of the agent is of such a nature, that it would be within the scope

¹ *Infra*, § 597.

of his authority under *ordinary* circumstances. A party dealing with an agent is not entitled to assume the existence of any unusual state of facts in order to bring the act of the agent within the scope of his apparent powers. Thus, the cashier of a bank may have authority, under certain circumstances, to rediscount negotiable paper of the bank, or to indorse his own promissory note in the name of the bank. But such a transaction would be outside of the *usual* course of the banking business; and a party receiving an indorsement of that character must at his peril ascertain whether the cashier had authority to make it.¹

§ 588. Secondly. Where an agent has authority to bind his principal under circumstances the existence of which must be peculiarly within his own knowledge, and of which a third person cannot easily inform himself, a party dealing with such agent in good faith and without notice is entitled to assume the existence of those circumstances. This rule rests upon the same reason as the rule which protects a person who deals in good faith with an agent authorized to represent his principal in a definite course of business, provided the agent does not exceed the scope of his ordinary powers; the rule is established, in order that business may be transacted with safety and convenience through agents. Accordingly, it is settled that a person dealing with an agent in good faith within the scope of his apparent powers is always, in the absence of some notice to the contrary, entitled to assume that *the purpose* for which the agent acted was one for which he had authority to act. If this were not the rule, it would be impossible to deal with any agent in safety.

So it has been held that, if the directors of a corporation have authority to borrow money upon obtaining a resolution at a general meeting, a party dealing with the directors in good faith and without notice will be entitled to assume that a proper resolution has been obtained.²

§ 589. *The Party dealing with the Agent must be deceived as to his Authority.* — The doctrine under consideration is ap-

¹ West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557; 8 Dill 403.

² See *infra*, § 590.

plicable only if the party dealing with the agent acts in good faith, and without legal notice that the action of the agent is unauthorized. If the party dealing with the agent has notice of facts indicating that the acts of the agent are unauthorized, he is evidently not entitled, as against the principal, to rely upon any express or implied representation of the agent that a different state of facts exists.

It seems evident, also, that this doctrine is applicable only in those cases where the scope of the agent's powers is disclosed, and where the party dealing with the agent acts in reliance upon the powers conferred *by the principal*. A person dealing with an alleged agent must at his peril ascertain what powers the principal has either actually conferred upon the agent or represented the agent to possess.¹

§ 590. *Character of the Agency to be considered.* — In applying these principles to acts performed by the agents of a corporation, it is, of course, necessary to consider the peculiar scope and character of the powers of such agents. Thus, the powers of the majority at a meeting of the shareholders or of the board of directors of a corporation are extremely broad and general, and are usually limited only by the terms of the company's charter.² Within the limits fixed by the charter, the majority may for many purposes be treated as the corporation itself.³ The authority of other agents, such as cashiers and tellers of banks, is fixed by general custom, of which the courts will take judicial notice.⁴

In other instances, the scope of the agent's authority is determined by the terms of his appointment, by the nature of the company's business, and by the practice which has been acquiesced in by the company. In the Supreme Court of the United States, Justice Harlan said: "It may be established by proof of the course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of con-

¹ *Rice v. Peninsular Club*, 52 Mich. 87; and see *infra*, §§ 593, 616.

² *Pollard v. Vinton*, 105 U. S. 12.

³ See *supra*, §§ 511, 537-540.

⁴ See *supra*, §§ 474, 510.

trolling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation.”¹

§ 591. **How far Notice must be taken of the Agent's Authority.** — **The Charter is Notice to all.** — It is a settled rule, that a person who deals with a corporation must, at his peril, take notice of its charter or articles of association. It follows, therefore, that, so far as the authority of an agent of a corporation is defined by its charter or articles of association, the scope of the agent's powers must always be considered as disclosed.²

The rule does not rest upon the ground that a charter or general incorporation law is a public statute of which all persons are deemed to have notice. It is a rule based upon no technical doctrine, but upon the necessities of the case. It applies to foreign corporations,³ as well as to domestic corporations, and to corporations chartered by private acts of the legislature as well as to those whose charters are part of the general laws.⁴

§ 592. **How far Notice must be taken of General Legislation.** — Ignorance of the law is not an excuse for a violation of the law. It seems, therefore, that persons dealing with a

¹ *Mining Co. v. Anglo-Californian Barb. 283; City Fire Ins. Co. v. Bank*, 104 U. S. 192, affirming 5 *Sawy. 255; Lee v. Pittsburgh Coal, &c. Co.*, 56 How. Pr. 376, 377; *Phillips v. Campbell*, 43 N. Y. 271. *Supra*, § 509.

² *Alexander v. Cauldwell*, 83 N. Y. 480; *Merritt v. Lambert*, 1 Hoffm. Ch. 168; *Hoyt v. Thompson*, 19 N. Y. 207; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 29; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 260; *Silliman v. Fredericksburg, &c. R. R. Co.*, 27 Gratt. 119, 130, 131; *Root v. Wallace*, 4 McLean, 8; *Pearce v. Madison, &c. R. R. Co.*, 21 How. 443. Compare *Bank of Chillicothe v. Dodge*, 8 Barb. 283; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Underwood v. Newport Lyceum*, 5 B. Monr. 129.

³ *Hoyt v. Thompson*, 19 N. Y. 208, 222; *Relfe v. Rundle*, 103 U. S. 222-226; *Davis v. Flagstaff, &c. Mining Co.*, 2 Utah, 74, 88; *Flagstaff, &c. Mining Co. v. Patrick*, 2 Utah, 804; *Bishop v. Globe Co.*, 185 Mass. 132. Compare *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

⁴ *Merritt v. Lambert*, 1 Hoffm. Ch. (N. Y.) 168. The same rule applies to registered joint-stock companies formed under the Companies Acts in England. See *infra*, § 595.

corporation are bound at their peril to take notice of all general legislation of the State by which dealings with the company are in any way affected, even though such legislation may not constitute part of the company's charter.

This rule, however, has no application to the legislation of a foreign State. Laws have no extra-territorial force, and there is no obligation to take notice of the laws of a foreign State, even in dealing with corporations which it has chartered. A person dealing with a foreign corporation is bound to take notice only of so much of the legislation of that State as enters into and forms part of the fundamental or constituent agreement by which the company is formed, and thereby limits the powers delegated to the company's agents.¹

§ 593. *Notice of By-laws.*—*Secret Instructions.*—It is plain that a person who has dealt with an agent of a corporation in good faith, within the scope of the apparent powers conferred upon him by the company, is not affected by secret instructions limiting these apparent powers.² The same is usually true of restrictions upon the apparent powers of the agents of a corporation by the company's by-laws. There is no general rule compelling persons dealing with a corporation, at their peril, to take notice of its by-laws.³ If a corporation appoints an agent of a class having certain functions and powers according to general custom, a person dealing with such agent is not affected by a by-law restricting the powers which would ordinarily belong to an agent of that class, in the absence of actual notice of the by-law.⁴ Thus a person deal-

¹ See *Hoyt v. Thompson*, 19 N. Y. 208, 222; *Bank of Chillicothe v. Dodge*, 8 Barb. 233; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

² *Merchants' Bank v. State Bank*, 10 Wall. 604, 650; *Wild v. Bank of Passamaquoddy*, 3 Mason, 506; *Insurance Co. v. McCain*, 96 U. S. 84.

³ It has been intimated that there is a distinction in this respect between by-laws made by the shareholders of the corporation and by-laws made by the board of di-

rectors. See *Samuel v. Holladay*, 1 Woolw. 400; s. c. *McCahon*, 214; *Cummings v. Webster*, 43 Me. 192. The writer is aware of no adequate reason for making any such distinction, and it has not, as a rule, been recognized in the cases.

⁴ See *Fay v. Noble*, 12 Cush. 1, *per Shaw, C. J.*; *Lee v. Pittsburgh Coal, &c. Co.*, 56 How. Pr. 376, 377; *Kingsley v. New England Mut. Fire Ins. Co.*, 8 Cush. 393; *Smith v. Smith*, 62 Ill. 493, 497; *Mechanics'*

ing with the cashier of a bank is not affected by a by-law of which he has no actual notice, restraining that officer from exercising powers usually belonging to cashiers of banks.¹

However, if an agent does not belong to a class whose powers are fixed by custom, a different rule would prevail. A person dealing with an agent is only entitled to assume that he has such powers as the principal has expressly or impliedly held him out to possess. If the principal has not held out the agent as belonging to a definite class, whose powers are established by custom, and has not acquiesced in a course of dealing by the agent, (which would be sufficient to establish the scope of the agent's powers,²) the party dealing with the agent must at his peril ascertain what powers have been actually delegated to him; and if these powers are conferred by a by-law of the corporation, it is clear that the terms of the by-law must be ascertained.³

§ 594. The effect of a by-law limiting the apparent powers of an agent of a corporation frequently depends on the application of several distinct principles. A person dealing with such agent is clearly not affected by the by-law, in the absence of actual or constructive notice thereof. But even where notice of the by-law is brought home to the person dealing with the agent, it does not follow that he must at his peril ascertain whether the by-law has been complied with. If the by-law is merely a provision for the internal government of the corporation, and prescribes formalities to be observed in the action of the company's agents, due compliance with the by-law may usually be assumed, in the ab-

Bank v. Smith, 19 Johns. 115; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Royal Bank of India's Case*, L. R. 4 Ch. 252; *In re County Life Ass. Co.*, L. R. 5 Ch. 288, 298.

¹ Justice Story said: "The officers of the bank are held out to the public as having authority to act according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of

business would, in general, bind the bank in favor of third parties possessing no other knowledge." *Minor v. Mechanics' Bank*, 1 Pet. 46, 70.

² *Supra*, § 590.

³ See *De Bost v. Albert Palmer Co.*, 85 Hun, 386, 388; *Dabney v. Stevens*, 2 Sweeny (N. Y.), 415; *Adriance v. Roome*, 52 Barb. 399, 411; *Rice v. Peninsular Club*, 52 Mich. 87.

sence of notice to the contrary.¹ It is clear that a by-law may be set aside by the authority which made it, and the want of authority in an agent to do an act in violation of a by-law may be cured by subsequent ratification.²

595. **The same Doctrines apply to English Joint-Stock Companies registered under the Companies Acts.** — Persons dealing with an English registered joint-stock company are bound, at their peril, to acquaint themselves with the provisions of the deed of settlement or articles of association of the company; but, in the absence of actual notice, they are not affected by by-laws or special instructions limiting the authority usually exercised by the agents with whom they deal.³

§ 596. **Notice of Laws and Ordinances of Municipal Corporations.** — There is a plain distinction between the by-laws and ordinances of a public or municipal corporation, and the by-laws of a private corporation, such as a railway or manufacturing company. The by-laws and ordinances of a municipality are in effect *local laws*, enacted by the municipal authorities in the exercise of legislative powers.⁴ Persons dealing with the officers and agents of a municipality are therefore bound, at their peril, to ascertain any limitations placed upon their powers by the municipal ordinances or by-laws.⁵

§ 597. **Acts authorized under ordinary Circumstances.** — **Negotiable Instruments.** — The general rule is established, that, if an act performed by an agent would, under ordinary circumstances, be within the authority delegated to the agent, a

¹ See *infra*, § 610.

² *Samuel v. Holladay*, 1 Woolw. 400; and see *infra*, § 618 *et seq.*

³ *Buckley*, p. 427; *Ernest v. Nicholls*, 6 H. L. C. 419; *Fountains v. Carmarthen Ry. Co.*, L. R. 5 Eq. 322; *Balfour v. Ernest*, 5 C. B. n. s. 601; *Royal Bank of India's Case*, L. R. 4 Ch. 252; *Smith v. Hull Glass Co.*, 11 C. B. 897, 926; *In re County Life Ass. Co.*, L. R. 5 Ch. 288, 298; *Royal British Bank v. Turquand*, 6 El. & Bl. 327.

⁴ See *supra*, § 491.

⁵ *Murphy v. City of Louisville*, 9 Bush, 189, 196. In this case, the court stated the rule as follows: "Those dealing with the corporation through its officials are bound to take the same notice of its laws and ordinances that a citizen of the State is with reference to legislative enactments." See also *Elliott Nat. Bank v. Western, &c. R. R. Co.*, 2 Lea (Tenn.), 676; *Humphrey v. Patrons' Mercantile Ass.*, 50 Iowa, 607, 611.

person dealing with him in good faith, on the faith of his apparent powers and without notice of facts showing that the act was unauthorized, may hold the principal liable whether the act was authorized or not.¹ Accordingly, it has been held that, if an agent of a corporation has authority to issue or indorse negotiable paper on behalf of the company in ordinary business transactions, a *bona fide* purchaser of negotiable paper issued or indorsed by such agent will be protected.²

Thus, the cashier of a bank has a general authority to issue and indorse negotiable paper, and to certify checks in carrying on the business of the bank;³ and a person who, in good faith and without notice, receives a note or draft issued or indorsed, or a check certified good, by the cashier of a banking corporation, will be entitled to hold the company liable, although the act of the cashier may have been unauthorized by its charter.⁴

¹ *Supra*, §§ 586, 587.

² *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *La Fayette Bank v. St. Louis, &c. Co.*, 2 Mo. App. 299; *Madison, &c. R. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Ridgway v. Farmers' Bank*, 12 S. & R. 256; *Philadelphia, &c. R. R. Co. v. Lewis*, 33 Pa. St. 33; *Rowland v. Apothecaries' Hall Co.*, 47 Conn. 384; *McIntire v. Preston*, 10 Ill. 48; *Stoney v. American Ins. Co.*, 11 Paige, 635; *Mechanics' Banking Ass. v. New York, &c. Lead Co.*, 35 N. Y. 505; *Matthews v. Mass. Nat. Bank*, 1 Holmes, 396; *Ex parte Estabrook*, 2 Lowell, 547; *Re General Estates Co.*, L. R. 3 Ch. 758; *Re Land Credit Co. of Ireland*, L. R. 4 Ch. 460; and see cases cited in the following notes.

The decision in many of the above cases seems to have been made to depend upon the application of the doctrine of *ultra vires*, whatever that may mean, and the prin-

ciples of the law of agency appear not to have been sufficiently considered. It is to be observed, however, that acts in excess of the charter of a corporation are necessarily in excess of the authority of every agent of the company, and the question of agency was therefore involved.

³ *Supra*, § 539.

⁴ *Bank of Genesee v. Patchin Bank*, 13 N. Y. 809; 19 N. Y. 312; *City Bank v. Perkins*, 29 N. Y. 554; *Barnes v. Ontario Bank*, 19 N. Y. 156; *Farmers', &c. Bank v. Butchers', &c. Bank*, 14 N. Y. 623; 16 N. Y. 133; 4 Duer, 219; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Faneuil Hall Bank v. Bank of Brighton*, 16 Gray, 534; *Everett v. United States*, 6 Port. 166. Compare *Mussey v. Eagle Bank*, 9 Metc. (Mass.) 306.

§ 598. **Non-negotiable Contracts.**—The rule also applies to non-negotiable contracts of every character, which would, under ordinary circumstances, be within the scope of the powers of the agents making them. A person entering into such contract or obligation in good faith, without notice of any circumstances indicating the transaction to be in excess of the powers of the company's agents, may assume that the agents do not exceed their actual authority.¹

§ 599. **Purchases and Sales of Property.**—The rule likewise applies to a purchase or sale of property by the agents of a corporation within the scope of their apparent powers.² In *Eastern Counties Railway Company v. Hawkes*,³ it was held that a person selling land to a railway company was not obliged to ascertain whether the land was needed for the company's purposes. Lord Cranworth said: "There was nothing to show the respondent that his land was not wanted for the legitimate purposes of the company, and in such a case it cannot be permitted to the directors to allege that the contract was invalid, as being beyond their powers; for, as argued at the bar, it could be no answer to an action for iron rails bargained and sold, that the contract had been entered into, not in order to obtain rails for the use of the line, but in order to keep them on hand for the purpose of a future use, on a speculation that iron was likely to rise in value."

¹ *Caldwell v. National Mohawk, &c. Bank*, 64 Barb. 333; *Citizens' Savings Bank v. Blakesley*, 42 Ohio St. 645; *Gano v. Chicago, &c. Ry. Co.*, 60 Wis. 12; *Thompson v. Lambert*, 44 Iowa, 239; *Bradley v. Ballard*, 55 Ill. 413; *Beers v. Phoenix Glass Co.*, 14 Barb. 358; *Railway Co. v. McCarthy*, 96 U. S. 258, 267; *Lee v. Pittsburgh Coal, &c. Co.*, 56 How. Pr. 373; *Express Co. v. Railroad Co.*, 99 U. S. 199; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331. See also *supra*, § 324, and *infra*, §§ 616, 617.

The cashier of a bank has apparent authority to indorse a trans-

fer on a certificate of stock held by the bank, and a *bona fide* purchaser may hold the bank liable on an implied warranty of the genuineness of the certificate. *Matthews v. Mass. Nat. Bank*, 1 Holmes, 396.

² *Alward v. Holmes*, 10 Abb. N. C. 96; *Moss v. Rossie Lead Mining Co.*, 5 Hill, 137, 140; *Yates v. Van De Bogert*, 56 N. Y. 526; *In re Peru Iron Co.*, 7 Cowen, 540; *Chataunogue County Bank v. Risley*, 19 N. Y. 381; *Farmers' Loan, &c. Co. v. Curtis*, 7 N. Y. 466; *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13.

³ *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331, 350.

§ 600. **Liability where the Authority to borrow or to issue Securities is limited to a gross Sum.** — If an agent of a corporation has authority by its charter to borrow money or to issue negotiable paper to a limited amount only, the company will be liable for money borrowed or notes issued by the agent in an ordinary business transaction, with a party acting in good faith and without notice, although the agent's authority may have been previously exhausted.¹

The same principle would be applicable to an issue of certificates of shares in excess of the amount authorized by the company's charter. The company would be liable to recognize the certificates as valid, unless certificates for the full amount of its capital stock had already been issued. It

¹ *Ossipee, &c. Manuf. Co. v. Canney*, 54 N. H. 295; *Gordon v. Sea Fire Ass. Co.*, 1 H. & N. 599; *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291, 295; *Humphrey v. Patrons' Mercantile Ass.*, 50 Iowa, 607, 611; *Nichols v. Mase*, 94 N. Y. 160. Compare *Fontaine v. Carmarthen Ry. Co.*, L. R. 5 Eq. 316; *Re Pooley Hall Colliery Co.*, 21 L. T. N. s. 690.

See also *Davis's Case*, L. R. 12 Eq. 516, and *Wilson's Case*, Id. 521. In *Davis's Case*, the directors of a building society, having a general power to borrow money for the purposes of the society, borrowed money for an entirely unauthorized purpose. Vice-Chancellor Sir James Bacon held that the lender of the money could not enforce his claim upon the winding up of the society. In *Wilson's Case*, it appeared that the directors of the same company had borrowed money for an unauthorized purpose, and had deposited certain title-deeds with the lender as security. An application having been made by the official liquidator for an order directing the lender to deliver up the title-deeds without repayment of the money

borrowed, the Vice-Chancellor refused to interfere.

The two cases seem to have differed in the fact that there was notice of the purpose of the loan in *Davis's Case*, but not in *Wilson's*. In the latter case the Vice-Chancellor said: "I find the transaction one not likely to raise any suspicion in the mind of the man who lent the money. He did not inquire into the circumstances. *It was not necessary he should*; he lent his money, and he took certain security."

The decision in *Wilson's Case*, that the lender should not be compelled to deliver up his security without repayment of his money was clearly correct. But it may be doubted whether the Vice-Chancellor was right in holding that the debt itself was not enforceable. If the lender had notice that the agents of the company were acting without authority in borrowing the money, neither loan nor security would be chargeable upon the company; but if the lender had no notice, both loan and security should be held valid and binding. See *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548, 562.

would, according to the same principle, be bound to recognize as valid any further issue of certificates if there were not a rule of law rendering absolutely void any increase of the capital stock of a corporation beyond the limit allowed by its charter. But as shares issued by a corporation in excess of the amount authorized by its charter are legally void,¹ an innocent purchaser of certificates issued on account of such shares has no remedy except by an action for damages.²

§ 601. **Where the Authority to borrow is limited to a Single Occasion.**—A somewhat different rule appears to be applicable where an agent is merely authorized to borrow a definite sum on a single occasion. If the authority of the agent is simply an authority to borrow on a single occasion, not constituting a part of a usual course of dealing, in which the agent is expected to represent the principal, a person lending money to the agent must, at his peril, ascertain whether or not the agent has already exhausted his authority.³

In all cases of this character it is necessary to consider the disclosed purposes of the agency, and the apparent powers conferred upon the agent by the principal. The rule which in many instances protects persons dealing with an agent in good faith, is established for the purpose of making it possible to carry on business transactions through agents, by rendering such transactions secure. The rule must, therefore, be applied in each case so as to give the agency the character intended by the principal, and enable the agent to carry on the course of dealing for which the agency was created.⁴

§ 602. **Rights of bona fide Purchasers of Negotiable Paper.**—Negotiable paper obtained from the agents of a corporation

¹ See *infra*, § 763.

² *New York, &c. R. R. Co. v. Schuyler*, 34 N. Y. 30; *infra*, § 605. Compare *supra*, § 186.

³ In *Lowell, &c. Sav. Bank v. Winchester*, 8 Allen, 109, it was held that, after a power given to an agent of a township to borrow not exceeding a certain amount on a single occasion had been fully exer-

cised, the township was not liable for a subsequent loan made by the agent, although he represented to the lender that he had not yet exercised the power.

⁴ A lender of money to an agent who has authority to borrow is clearly not obliged to see to the application of the funds. *Donnell v. Lewis County Savings Bank*, 80 Mo. 165.

by a party having notice of their want of authority to issue it, may become binding upon the company after it has passed into the hands of a purchaser without notice. A purchaser of a negotiable instrument issued or indorsed by an agent of a corporation to a prior holder, stands in the same position as a party dealing directly with the agent. He must at his peril take notice of limitations placed upon the agent's authority by the charter or articles of association of the company, but not of special instructions; and if the agent who issued or indorsed the paper would have had authority to do so under ordinary circumstances, the purchaser, acting in good faith, may assume that the agent had authority to issue or indorse that particular paper.¹ So, if the agents of a corporation are authorized to issue and sell its negotiable bonds at a certain price, or upon complying with certain formalities, an innocent purchaser of the bonds from a prior holder will be entitled to charge the company upon the bonds, although they were sold below the prescribed price, or without complying with the prescribed formalities.²

§ 603. *Rights of bona fide Purchasers of Certificates for Shares.*—Upon the same principle, it has been held that, if the agents of a corporation who are invested with authority to issue certificates for shares in the ordinary form issue certificates declaring on their face that the shares for which they are issued have been paid up, a *bona fide* purchaser of the certificates is entitled to rely upon the truth of the representation, and the corporation is bound thereby, although the shares may not have been paid up.³

¹ *Ex parte Chorley*, L. R. 11 Eq. 157; *Hulett's Case*, 2 J. & H. 306; *Petroleum Co.*, 50 Barb. 247, s. c. 36 How. Pr. 380, it is said that an agreement made by a corporation to sell shares of its own stock for less than par is *prima facie* valid and binding. The correctness of this doctrine is questionable. A corporation can sell its own shares at less than par only in exceptional cases.

² *Ellsworth v. St. Louis, &c. R. R. Co.*, 98 N. Y. 553, 557; and see *infra*, §§ 610, 612.

³ See cases *infra*, § 836; and see

supra, § 806. In *Otter v. Brevoort*, 36 How. Pr. 380, it is said that an agreement made by a corporation to sell shares of its own stock for less than par is *prima facie* valid and binding. The correctness of this doctrine is questionable. A corporation can sell its own shares at less than par only in exceptional cases. See *supra*, § 806.

§ 604. Rights of Assignees of non-negotiable Obligations.—

An assignee of a non-negotiable engagement can claim no greater rights than belonged to his assignor. At law he must sue in the name of the original party to the contract; and in chancery only the equitable rights of the assignor can be enforced. Hence, a *bona fide* purchaser of a non-negotiable obligation of a corporation is not benefited by the doctrine of agency under consideration, although the principle of this doctrine would be applicable. He is barred by the positive rule, that the assignee gets no rights except those of the assignor.¹

However, a corporation may become liable directly to the assignee of a non-negotiable contract by an acceptance of the assignment, operating as a novation; and where an assignment was accepted upon the faith of representations made by the agents of a corporation within the scope of their authority, the company may be held liable, upon the principle of estoppel. "Whatever equities a company may have against the original obligee on a bond issued by them, they may, either by direct admission or by conduct, preclude themselves from setting them up against an assignee for a valuable consideration."²

§ 605. Liability for unauthorized Fraudulent Representations.

— The liability of a corporation for fraudulent representations made by its agents while acting within the scope of their apparent powers rests upon the same principle as the liability for unauthorized contracts made under similar circumstances. Of course, no agent of a corporation has actual authority to make fraudulent representations on behalf of the company. But the agents of a corporation have in many instances authority to make representations upon which persons dealing with the company are expected to rely; and if the representations are of a class which would ordinarily be within the apparent powers and duties of the agent, a person

¹ *Athenæum Life Ass. Soc. v. Pooley*, 3 De G. & J. 294; and compare *Brunton's Claim*, L. R. 19 Eq. 312. ² *Brunton's Claim*, L. R. 19 Eq. 302, 315, *per Malins*, V. C.

dealing with the agent in good faith may assume that the representations were in fact authorized.

The law upon this subject was very fully discussed in *The New York and New Haven Railroad Company v. Schuyler*.¹ The facts of the case were as follows. Robert Schuyler, president of the New York and New Haven Railroad Company, had a general authority to execute transfers of shares upon the books of the company, and to issue stock certificates to the proper parties. He also had authority to sell any shares which had been forfeited to the company, or which had not been taken by the original subscribers. The capital stock of the company was limited by its charter to a certain amount, and divided into a fixed number of shares. Schuyler, however, fraudulently issued certificates representing a large number of shares in excess of the number allowed by the charter, and many of these fraudulent certificates passed into the hands of *bona fide* purchasers for value.

A bill in equity having been brought by the railroad company for a cancellation of the certificates issued without authority, the Court of Appeals of New York held that the capital of the company could under no circumstances be increased beyond the amount limited by the charter, and that the certificates in excess of this amount were therefore void, and must be delivered up; but the court also decided that *bona fide* purchasers of the spurious certificates were entitled to be reimbursed by the company for the damages which they had sustained through the fraud of its president.²

¹ *New York, &c. R. R. Co. v. North American Mining Co.*, 4 Mich. Schuyler, 34 N. Y. 30. See also 465; *People's Bank v. Kurtz*, 99 Sturges v. Bank of Circleville, 11 Pa. St. 344, 349; *Willis v. Fry*, 13 Ohio St. 153; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116. Phila. 83.

² See this case further considered, *infra*, § 683. See also *Tome v. Parkersburg, &c. R. R. Co.*, 39 Md. 36; *Mechanics' Bank v. New York, &c. R. R. Co.*, 13 N. Y. 599; *Bridgeport Bank v. New York, &c. R. R. Co.*, 30 Conn. 231; *Mandlebaum v.* In *Wright's Appeal*, 99 Pa. St. 425, a recovery against the corporation was denied, because the officer issuing the illegal certificates received them as agent for the party buying them. See also *Moores v. Citizens' Nat. Bank*, 111 U. S. 156.

The measure of damages to which a *bona fide* purchaser or pledgee of the void certificates is entitled, is the amount of the loss actually caused by the deception. In determining this amount, it is necessary to consider what would be the value of the certificates assuming the shares to be valid ; and if, upon assuming this to be the case, the corporation would have a lien upon the shares for advances to the holder on the stock-books, the apparent value of the certificates must be appraised accordingly.¹

§ 606. Acts not authorized under Ordinary Circumstances. — A party dealing with an agent is not entitled to assume the existence of any extraordinary state of facts in order to bring the acts of the agent within the scope of his apparent authority. Hence, if an act performed by an agent of a corporation would be in excess of the company's charter or the agent's authority except under extraordinary circumstances, the company can be held bound by such act only provided those extraordinary circumstances did exist.

Thus, the cashier of a bank may have authority under certain circumstances to secure his own promissory note by an indorsement in the name of the bank ; but he would not have authority to make an indorsement of that character under ordinary circumstances ; and therefore a party receiving a note drawn by a cashier, and indorsed in blank in the name of the bank before being indorsed by the payee, must at his peril ascertain whether the cashier acted within the scope of his authority.²

The directors of a trading corporation have authority under certain circumstances to sell any, or even all, of the company's property. Yet a sale of the whole property and trade of a company, or of any property known to be necessary to carry on its business, would not be binding, even in favor of a person acting in good faith, unless the circumstances under which the transaction would be proper actually exist. A person dealing with the agents selling the property would not be

¹ Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513. Shawnee County Bank, 95 U. S. 557; 3 Dill. 403. See Claffin v.

² West St. Louis Sav. Bank v. Farmers', &c. Bank, 25 N. Y. 293.

entitled to assume the existence of circumstances of so unusual a character.¹

Again, if the agents of a corporation have no authority to issue negotiable paper on behalf of the company, except under special circumstances, a purchaser of negotiable paper issued by such agents cannot presume that the paper was properly issued; and, in order to hold the company liable, he must show the existence of the special circumstances upon which the authority of the agent to bind the company rested.²

§ 607. *The Authorities on this Point criticised.* — The language of the authorities upon this point is frequently not very clear, on account of the unfortunate use of the expression *ultra vires*. Thus, in *Miners' Ditch Company v. Zellerbach*,³ Sawyer, C. J., said: "An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. An act is also sometimes said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent, or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary, according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is

¹ See *Rollins v. Clay*, 33 Me. Township *v. Andress*, 56 Ind. 157; 132; and see *supra*, §§ 512, 513. *Lucas v. Pitney*, 3 Dutch. 221; Compare *Ernest v. Nicholls*, 6 H. L. *Hackettstown v. Swackhamer*, 37 C. 401, 421; and see *Balfour v. Ernest*, 5 C. B. N. S. 601, 624. *N. J. Law*, 191; *Knight v. Lang*, 4 E. D. Smith, 381.

² See *The Floyd Acceptances*, 7 Wall. 666, 680; *Mayor v. Ray*, 19 Wall. 468; *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116; *Silliman v. Fredericksburg, &c. R. R. Co.*, 27 Gratt. 181; *Sheffield School* ³ 37 Cal. 578, and cases cited; *Bissell v. Michigan Southern, &c. R. R. Co.*, 22 N. Y. 293; *McPherson v. Foster*, 43 Iowa, 65; *New York Iron Mine v. First Nat. Bank*, 39 Mich. 644, 657.

generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case."

In other cases a distinction has been drawn between such acts as are *ultra vires* of the corporation, and such acts as are *ultra vires* as between the directors and the shareholders of the company.¹

All this is at the best misleading. Every act of a corporation which is not authorized by its charter is *ultra vires* in the sense that it involves an unlawful exercise of corporate power; and it is wholly immaterial for this purpose, that a similar act might perhaps have been lawfully performed for a different purpose, or under a different state of facts.²

No agent of a corporation can have authority to do an act in violation of the company's charter; and, as all persons dealing with a corporation must take notice of the provisions of its charter, it follows that the agents of a corporation can never bind it by an act which the charter does not authorize, under any circumstances, or for any purpose whatsoever. If the charter of a corporation authorizes a particular act to be performed only under certain circumstances, then no agent of the company has authority to perform such act, unless the required circumstances do exist; but, in accordance with the general principles of the law of agency, a corporation may in many cases be bound by an act of that description, even when performed by its agents without authority.

§ 608. Again, numerous *dicta* may be found to the effect that, if a contract or act would be within the chartered powers of a corporation under *any* circumstances, an innocent party may assume the existence of such circumstances, and the corporation will be estopped from showing the

¹ *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. C. 331, 372; 35 Eng. L. & Eq. 9, 32, *per* Lord Campbell; *Mayor of Norwich v. Norfolk Ry. Co.*, 4 El. & Bl. 397, 443.

² The consequence of the illegality of an unauthorized exercise of corporate power, or the violation of a statute by a corporation, will be considered hereafter. See § 648 *et seq.*

contrary.¹ Thus Justice Swayne said: "When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which gave the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper."² In another case the same learned judge said: "If the contract can be valid *under any circumstances*, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."³

These *dicta* must be considered in view of the facts of the particular cases in which they were made. Taken alone, as statements of a principle or rule of law, they are certainly not in accordance with the decisions, and cannot be supported upon any sound principle. If a corporation were liable to a party acting in good faith, and without notice, for every act of its agents which might under *any* circumstances have been authorized by the company's charter, as has been sometimes stated, then the responsibility of a corporation for the acts of its agents would be practically unlimited; for extraordinary circumstances are conceivable which would bring the most unusual acts within the implied powers of an ordinary trading corporation.⁴ On the other hand, there is no class of acts which the charter of a corporation authorizes it to perform under *all* circumstances, or for *all* purposes.⁵

It is obviously impossible to state any precise rule by which a line can be drawn, in every case, between such acts as are sufficiently unusual to put persons dealing with an agent upon inquiry, and such acts as may be presumed to be within the agent's authority. Each case must be considered in view of its own peculiar facts and circumstances.⁶

¹ *Moss v. Rossie Lead Mining Co.*, 5 Hill, 137, 140, and many of the cases cited in the preceding sections.

² *Gelpcke v. Dubuque*, 1 Wall. 175, 203; *City of Lexington v. Butler*, 14 Wall. 282.

³ *Merchants' Bank v. State Bank*, 10 Wall. 604, 644.

⁴ See the next section, and see *supra*, § 362.

⁵ *Supra*, § 362.

⁶ See *Fountaine v. Carmarthen Ry. Co.*, L. R. 5 Eq. 316.

§ 609. **Correct Statement of the Doctrine.** — In *Eastern Counties Railway Company v. Hawkes*,¹ Lord St. Leonards used these words: “Where the directors are acting in the obvious line of duty, as in this case, buying off an opposition and acquiring property necessary or useful for the corporation, and the party contracting with such directors is not aware of any intended misapplication on their part, I am of opinion that the contract is binding, although it can afterwards be shown that the property really was not required for the railway. The safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds.”

In *Mayor of Norwich v. Norfolk Railway Company*,² Lord Campbell, C. J., said: “The mere circumstance of a covenant by directors, in the name of the company, being *ultra vires* as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it. For example, if the directors of a railway company were to enter into a contract under seal of the company for the purchase of a large quantity of iron rails, and to pay for them at a fixed price, as the vendor had reasonable ground for supposing that the rails were wanted for the purpose of a railroad, it would be no defence to an action for the price, or for not accepting them, that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; ³ this excess of authority would neces-

¹ *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. C. 331, 371; and see *per* Lord Cranworth, L. C., on p. 350. See also *Moss v. Rossie Lead Mining Co.*, 5 Hill, 137, 140.

² *Mayor of Norwich v. Norfolk Ry. Co.*, 4 El. & Bl. 397, 443; s. c. 30 Eng. L. & Eq. 143.

³ Nevertheless, circumstances can be imagined under which the directors of a railway company would have authority to purchase green spectacles. Thus, if green spectacles were required for the use of the servants of the company, as a protection against snow or dust while working upon the road, there can be no doubt that the directors would

sarily be known to the covenantee, and he being *in pari delicto*, I conceive that the maxim would apply, *Potior est conditio possidentis*. This would be an illegal contract to misapply the funds of the company, and the illegality might be set up as a defence. So if, without any consideration whatever, the directors of a railway company were to put the company's seal to a deed covenanting to pay a mere stranger £1,000, this would be *ultra vires* to the knowledge of the covenantee, and he could not maintain an action to recover the £1,000 from the funds of the company, in fraud of the shareholders. Where the excess of authority, with knowledge of both parties, is shown by plea, this joint violation of the law, I apprehend, is a bar to the action."

In the same case,¹ Erle, J., said, in discussing the East Anglican Railway Company's case:² "Looking at the report, with the remarks in the argument, I understand the court to have meant that any application of the funds, and any contract which, in the knowledge of the party who should sue on the contract, was intended for a purpose unconnected with the purpose of incorporation, was prohibited; and that, where the contract itself appeared to be necessarily unconnected with the purpose of incorporation, both the parties must have known it to be so, and the court judicially perceive it to be void; and that, if the contract was not necessarily so unconnected, the ground of illegality must be averred and found in the usual way before it could be a ground of judgment; and that no application of the funds and no contract was prohibited by implication, which the parties intended to be connected with the purpose of incorporation, however distant the connection might be. The question put in the course of the argument, 'Would a contract by a railway company for a theatre or chapel be void?' exemplifies the doctrine. It would or would not, according as the purpose of the contracting parties was or was not connected with the railway.

have authority to supply them. Such a state of facts would, however, be very unusual, and could not be presumed.

¹ 4 El. & Bl. 414, 415.

² East Anglican Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; s. c. 16 Jurist, 249, 250.

It might be a speculation separate from the railway, and prohibited. Or, if works were wanted in a waste place, and the company found it to be for their interest to build a town, and supply it with all requisites for inhabitancy, and, in order to secure a permanent supply of workmen of skill and responsibility, added a chapel and a theatre, with religious and secular instruction, it might be for the purpose of the railway, and valid, and, though distantly connected, the outlay might be found eventually to increase the profit from the traffic."¹

§ 610. *Matters peculiarly within the Agent's Knowledge.* — *Formalities.* — Charters of incorporation frequently contain provisions for the internal government of the companies formed under them; thus, it is common to provide checks upon the various officers or agents who are employed by such companies, and to prescribe rules for the orderly transaction of business. Provisions of this character cannot be disregarded by the company's agents; if an agent of a corporation acts in a manner which is not authorized by the company's charter or by-laws, his acts are ordinarily not binding.²

However, a party dealing with an agent of a corporation has usually no means of ascertaining whether formalities prescribed in the management of the internal affairs of the company have been complied with, and matters of this kind are peculiarly within the knowledge of the company's agents. It has therefore been held, that, if a person deals with an agent of a corporation within the scope of his apparent authority, and without notice of the non-performance of any formality prescribed by the charter or by-laws as a condition precedent to the agent's authority to act, he will be entitled to assume that the formality has been complied with, and the corporation will be estopped from showing that the agent had no authority to bind it, by reason of a failure to comply with the prescribed condition.³

¹ Probably, however, a railway company making a contract for the construction of a church or chapel would be a sufficiently extraordinary phenomenon to put builders on inquiry.

² *Supra*, § 582.

³ *Supra*, § 588.

The case of the *Royal British Bank v. Turquand*¹ has been frequently cited to establish this doctrine. By the deed of settlement of a joint-stock company the directors were authorized to borrow money, upon obtaining a resolution at a general meeting of the company. The directors having borrowed, it was held by the Court of Exchequer Chamber that the company was liable to repay the money to the lender, who had acted in good faith; and that it was immaterial whether a proper resolution had been obtained or not. Jervis, C. J., said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."²

§ 611. The same doctrine has been affirmed in other cases. Thus, it has been held that a policy of insurance issued by an agent of a company, whose deed provided that "the common

¹ *Royal British Bank v. Turquand*, 6 El. & Bl. 327.

² *Ibid.* 332. See also *Ex parte Holmes*, 3 W. W. & A. B. (Victoria) 162; *In re Athenæum Life Ass. Soc.*, 4 K. & J. 549; *Colonial Bank v. Willan*, L. R. 5 P. C. 417; *Mahoney v. East Holyford Mining Co.*, L. R. 7 H. L. 869; *Smith v. Hull Glass Co.*, 11 C. B. 897; *Connecticut Mut. Life Ins. Co. v. Cleveland, &c. R. R. Co.*, 41 Barb. 9; *Samuel v. Holladay*, *McCahon*, 214; s. c. 1 Woolw. 400; *Madison, &c. R. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Nichols v. Mase*, 94 N. Y. 160; *Granger v. Original Empire Mill, &c. Co.*, 59 Cal. 678;

McDougald v. Lane, 18 Ga. 445; *McDougald v. Bellamy*, 18 Ga. 412. Compare *Fontaine v. Carmarthen Ry. Co.*, L. R. 5 Eq. 316.

In *Re County Life Ass. Co.*, L. R. 5 Ch. App. 293, Gifford, L. J., said: "A stranger must be taken to have read the general act under which the company is incorporated, and also to have read the articles of association; but he is not to be taken to have read anything more, and, if he knows nothing to the contrary, he has a right to assume as against the company that all matters of internal management have been duly complied with."

seal shall not be affixed to any policy, except by an order signed by three directors and countersigned by the manager," was valid and binding, although a proper order had not been obtained, provided the assured had acted in ignorance of the informality.¹ And, for the same reason, it follows that a corporation cannot repudiate a mortgage made to secure bonds in the hands of *bona fide* purchasers without notice, merely because the resolution authorizing the bonds to be issued was passed by the directors of the company in a foreign State.²

Persons dealing with a corporation on the faith of resolutions adopted at a meeting of its directors or shareholders, are generally entitled to assume that the meeting was duly called, notified, and conducted.³ They may also assume the truth of a representation, contained in a resolution adopted by the directors, of any fact relating to the management and affairs of the corporation.⁴

§ 612. **The Rule applicable to Municipal Corporations.**—In *Knox County v. Aspinwall*,⁵ the principle of the case of the *Royal British Bank v. Turquand* was approved by the Supreme Court of the United States, and held to apply to an issue of bonds made by the officers of a county without complying with statutory requirements. The facts of the case were as follows. A statute of Indiana gave the board of commissioners of a county authority to subscribe for shares in a railroad company, and issue bonds in payment, in case a majority of the voters of the county should so determine after certain notices of the time and place of voting had been given. The commissioners of a county having subscribed for shares, and issued bonds purporting to have been issued in compliance with the statute, the Supreme Court held that the county could not deny that the prescribed notices of the time and

¹ *Prince of Wales Life, &c. Co. v. Webster*, 18 Metc. (Mass.) 497. *v. Harding*, El. & El. 188; *In re Compare Harding v. Vandewater*, Athenæum Life Ass. Soc., 4 K. & J. 40 Cal. 78.

549; *Smith v. Smith*, 62 Ill. 493.

² *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459.

⁴ *Bank v. Flour Co.*, 41 Ohio St. 552, 559.

⁵ *Knox County v. Aspinwall*, 21 How. 544.

³ *Granger v. Original Empire Mill, &c. Co.*, 59 Cal. 678; *Sargent*

place of election had been given, in a suit brought by a *bona fide* purchaser of the bonds.

The decision in *Knox County v. Aspinwall* was based upon two grounds. One was the principle of agency involved in *Royal British Bank v. Turquand*; the other was the legislative intent expressed in the act authorizing the bonds to be issued.

The first ground was stated by Justice Strong, in *Town of Coloma v. Eaves*,¹ in the following words: "In the leading case of *Knox v. Aspinwall*, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for the assumption by the purchaser, that the conditions on which the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to *The Royal British Bank v. Turquand*, 6 El. & Bl. 827, a case in the Exchequer Chamber, which fully sustains it, and the decision was concurred in by all the judges."

The other ground was formulated by the same learned judge as follows: "Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal."²

¹ *Town of Coloma v. Eaves*, 92 U. S. 484, 490.

VOL. II. — 3

•

² *Ibid.*, 484, 491; and see *Moran v. Miami County*, 2 Black, 732; *Mercer*

§ 613. The true Ground upon which unauthorized Issues of Municipal Bonds have been sustained. — In later cases of a similar character, the Supreme Court has based its decisions solely on the second ground; namely, the expressed or implied intention of the legislature that certain municipal officers shall have authority to determine and certify whether the requirements of the law have been fulfilled; and this seems clearly to be the ground on which these cases ought to be placed.

Municipal governments have no authority whatever to issue negotiable paper or bonds, under ordinary circumstances; they have no authority to do so unless expressly authorized by the legislature.¹ If then the legislature, in granting authority to certain officers to issue bonds on behalf of the municipality, expressly makes the authority depend upon the performance of certain conditions precedent, it would be difficult to imply an intention to give *bona fide* purchasers a right to assume the performance of the conditions, and hold the municipality liable whether the conditions have been performed or not.

It should be observed, however, that the principle of *Royal British Bank v. Turquand* is a general principle of the law of agency, and should undoubtedly be applied to acts performed by the agents of a municipal corporation in all cases falling within the principle. In the absence of a legislative declaration to the contrary, a person dealing with an agent of a municipality may make the same assumptions which he could make under similar circumstances in dealing with the agent of a private company. It is evident, also, that the

County v. Hackett, 1 Wall. 83; County v. Field, 111 U. S. 83, 94. Meyer v. Muscatine, 1 Wall. 884; But see the dissenting opinion of Supervisors v. Schenck, 5 Wall. Justice Miller in Humboldt Township v. Long, 92 U. S. 646; McPherson v. Foster, 43 Iowa, 48. U. S. 104; Township of Rock Creek v. Strong, 96 U. S. 271; County of Daviess v. Huidekoper, 98 U. S. 98; As to the necessary allegations in a suit by the holder of municipal bonds, see Lincoln v. Iron Co., 103 U. S. 412. Buchanan v. Litchfield, 102 U. S. 278; Lincoln v. Iron Co., 103 U. S. 412; Northern Bank v. Porter Township, 110 U. S. 608, 616; Dixon

¹ Claiborne County v. Brooks, 111 U. S. 400.

reasons of policy which led the courts to establish the rule in *Royal British Bank v. Turquand* have largely influenced the Supreme Court of the United States in the construction of the statutes providing for the issue of municipal bonds. The importance of giving such bonds a marketable value, by rendering them a safe investment to *bona fide* purchasers, has led the courts, in many instances, to imply an intention on the part of the legislatures of the States to constitute the municipal officers the judges whether the prescribed formalities have been complied with, even where that intention was not clearly expressed.

§ 614. **Extent of Authority of Officers of a Municipality to certify the Validity of its Bonds.** — The decision and certificate of the officers of a municipality do not bind the latter, except as to those matters which are within the jurisdiction conferred upon these officers. In *Dixon County v. Field*,¹ Justice Matthews, after quoting with approval the rule laid down by Justice Strong, in *Town of Coloma v. Eaves*, said: "The converse is embraced in the proposition, and is equally true. If the officers authorized to issue bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof."

It is evident that the officers never have implied authority to bind the municipality by their recital concerning matters of law, or facts which persons dealing with them must, according to the general rules of law, ascertain at their peril. Persons purchasing the bonds of a municipality must, at their peril, ascertain the laws of the State which created it, and must see that the bonds are regular on their face. No recital of the municipal officers will protect a purchaser against any defect which can be ascertained by comparing the bonds with the terms of the statutes under which they were issued.² So it has been held that the officers of a municipality can have

¹ *Dixon County v. Field*, 111 U. S. 93-95. It is clear that the prescribed signatures

² *Bissell v. Spring Valley Township*, 110 U. S. 162; *Dixon County*

no implied authority to bind the municipality by a recital concerning the existence of facts which are established by the public records of the State.¹

§ 615. **What Certificate is required.** — The difficulty in all these cases is to determine whether the legislature intended that the officers of the municipality should have authority to determine whether the forms and conditions prescribed by the law have been complied with. No formal certificate or recital is necessary, if the officers of the municipality are authorized to pass upon the question. In *Dixon County v. Field*,² Justice Matthews said: "It is not necessary that the recital should enumerate each particular fact essential to the existence of obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, when more than one is involved, is a determination and certificate as to each essential particular. But it still remains, that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of the admissions."

There seems to be no reason why any recital on the face of the bonds should be necessary, where none is expressly required by law. A general recital that the law was complied with, or that the bonds were issued in conformity with the law, would merely be the statement of a legal conclusion, and it is difficult to perceive on what principle any weight could be given to such a statement. On the other hand, the issue of the bonds by the officers authorized to determine whether the law was complied with is of itself a determination of that question, and a certificate of the existence of the necessary facts. Nothing further should be required.³

¹ *Hoff v. Jasper County*, 110 U. S. 53, *Lewis v. Barbour County*, 1 McCrary, 458.

² 111 U. S. 83, 92, 98.

³ See *per Justice Harlan* in *Hackett v. Ottawa*, 99 U. S. 86, 95; *per*

§616. *Proof of Agent's Authority.—Presumptions.—Contracts under Seal.*—The general rule is, that, in order to charge a principal with an act performed by another as agent, it is necessary to show that the agent was authorized by the principal to do that act.¹ In many instances, however, this fact may be established by presumptive evidence. Thus, if the general scope of the agent's authority has been proven, and it appears that acts like that in question would, under ordinary circumstances, be within the agent's authority, a presumption arises that the necessary circumstances did exist, and that the act in question was authorized. This presumption is a reasonable one, and will stand until rebutted by evidence showing that the agent in fact exceeded his authority in doing the act.²

The doctrine discussed in the preceding sections, however, is not merely a branch of the law of evidence; it embodies a principle of substantive law. In a case in which that doctrine is applicable, evidence showing that the agent in fact exceeded his authority would be inadmissible, because the fact would not be material.

If a person has dealt with an agent in good faith within the scope of his apparent authority, and relying upon this apparent authority, the principal will be chargeable with the act whether the agent exceeded his authority or not. Proof of such dealing would therefore establish a case against the principal; and in order to establish a defence it would be necessary to show, not only that the act of the agent was unauthorized, but also that the party dealing with the agent had notice thereof, or that he did not rely upon the apparent powers conferred upon the agent by the principal. This rule applies to every kind of act performed by the agents of a

Justice Swayne in *San Antonio v. Palmer Co.*, 35 Hun, 386; *Orr Mehaffy*, 96 U. S. 314; *per* Justice Clifford in *Supervisors v. Schenck*, 5 Wall. 784.

¹ *Supra*, §§ 579, 589, 593; *Gregory v. Lamb*, 16 Neb. 205; *Twelfth Street Market Co. v. Jackson*, 102 Pa. St. 269; *De Bost v. Albert*

Water Ditch Co. v. Reno Water Co., 17 Nev. 166. Proof of ratification would ordinarily be equivalent in legal effect to proof of precedent authority.

² See *Lincoln v. Iron Co.*, 103 U. S. 412.

corporation; it applies equally to simple contracts, whether oral or in writing, and to contracts under seal.¹

§ 617. In some instances, however, the rule has been stated much too broadly, particularly with reference to contracts executed under the corporate seal. It has been said, that, "where the common seal of a corporation appears to be affixed to an instrument and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority."² This statement should be restricted to those cases in which the execution of the instrument would be within the authority of the officers whose signatures are proven, *under ordinary circumstances*. Courts can make no presumptions which are not warranted by reason; and the seal of a corporation is endowed with no peculiar probative force.³ The rule, and the reasons on which it is founded, have no application where it would be necessary to assume an extraordinary state of affairs in order to bring the act of the agents of the corporation within the scope of their apparent powers.

C.

§ 618. **The Doctrine of Ratification.** — It is an elementary principle of the law of agency, that a person on whose behalf an act was done by another, without authority, under an

¹ *Solomon's Lodge v. Montmol-*
lin, 58 Ga. 547; *Koehler v. Black*
River, &c. Iron Co., 2 Black, 715;
Union Gold Mining Co. v. Bank,
2 Col. 226; *Phillips v. Coffee*, 17
Ill. 154; *Reed v. Bradley*, Id. 321;
Morris v. Keil, 20 Minn. 531; *Conine*
v. Junction, &c. R. R. Co., 3 Houst.
288; *Musser v. Johnson*, 42 Mo.
74; *Evans v. Lee*, 11 Nev. 194;
Lovett v. Steam Saw Mill Ass., 6
Paige, 54; *Bank of Middlebury v.*
Rutland, &c. R. R. Co., 30 Vt. 159;
Woodman v. York, &c. R. R. Co.,
50 Me. 549; *Stebbins v. Merritt*, 10
Cush. 27, 34; *Susquehanna Bridge,*

&c. Co. v. General Ins. Co., 3 Md.
305; *Blackshire v. Iowa Homestead*
Co., 39 Iowa, 624; *Bliss v. Kaweah*
Canal, &c. Co., 65 Cal. 502.

² *Canandarqua Academy v. Mc-*
Kechnie, 90 N. Y. 618, 629; *New*
England Iron Co. v. Gilbert El.
R. R. Co., 91 N. Y. 154; *Southern*
Cal. Colony Ass. v. Bustamente, 52
Cal. 192; *Mickey v. Stratton*, 5
Sawy. 475; *Wood v. Whelen*, 93
Ill. 153, 162; *Thorington v. Gould*,
59 Ala. 461; *Angell and Ames on*
Corporations, § 224. See also *supra*,
§ 340.

³ See *supra*, §§ 341, 342.

assumed agency, may adopt and thereby ratify the act; and after such ratification the act will be binding upon the party on whose behalf it was done, to the same extent as if it had been performed in pursuance of a previous grant of authority.¹

No certain form of words is essential to a ratification of an act performed by an agent; in many cases mere acquiescence or a failure to repudiate the act has been held sufficient. Kent said: "It is a very clear and salutary rule in relation to agencies, that where the principal, with knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them under pretence that they were done without authority, or even contrary to authority."²

The same rule applies to corporations. In *Kelsey v. National Bank*,³ Williams, J., said: "The law is well settled, that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent."

§ 619. *Scope of the Doctrine of Ratification. — Acts in Violation of the Charter or a Rule of Law.* — In considering the application of the doctrine of ratification to acts performed on behalf of a corporation, a distinction should be observed between such acts as are in violation of the company's charter, and therefore outside of the powers delegated to any of its agents, and such acts as are merely in excess of the powers delegated to inferior agents by those who have appointed them, but are within the powers of the appointing agents.

An act which is in excess of the charter of a corporation involves an unauthorized exercise of corporate power on the

¹ *Soames v. Spencer*, 1 Dowl. & R. 32.

³ *Kelsey v. National Bank*, 60 Pa. St. 426, 429.

² 2 Kent's Com. 616; Story on Agency, §§ 239, 255, 256.

part of the company; and this objection cannot be obviated by any subsequent ratification, either by the agents or by the shareholders of the corporation. So it is clear that, if an act performed by an agent on behalf of a corporation is prohibited by statute, or by the charter of the company, or by some general rule of the common law, no ratification by other agents or the shareholders of the company can cure the illegality of the act. Ratification of an act has no greater effect than a previous grant of authority to do the act; it merely obviates the objection that the principal did not authorize the act to be done.¹

In determining the liability of a corporation for an act performed on its behalf, the first question to be considered is whether the agent who performed the act had authority to represent the corporation. If the act was ratified by the corporation, the question of agency may be dismissed, and the question then is how far the act is binding, irrespective of the principles of the law of agency; and if the act was performed in violation of some statutory or common law prohibition, the legal effect of this prohibition must be considered.²

§ 620. **Acts in Violation of the Rights of other Parties.**—It is plain, that the shareholders and agents of a corporation cannot by their ratification give validity to an act impairing the rights of others. Thus, they cannot by their unanimous consent authorize a withdrawal of capital in violation of the rights of creditors, nor can they render such withdrawal rightful by subsequently ratifying the same.³

¹ *Ashbury Ry., &c. Co. v. Riche*, L. R. 7 H. L. 672, 673; *In re Comstock*, 3 Sawy. 218. See also *Barton v. Port Jackson, &c. Plank Road Co.*, 17 Barb. 397; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 185; and compare *Hazlehurst v. Savannah, &c. R. R. Co.*, 43 Ga. 54; *Martin v. Zellerbach*, 38 Cal. 310; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Hood v. New York, &c. R. R. Co.*, 22 Conn. 502, 510.

In Tippecanoe Co. v. Lafayette, &c. R. R. Co., 50 Ind. 86, 112, *Biddle, J.* said: "A contract *ultra vires* is void, and cannot be made valid by a subsequent act of the corporation, because there is no residuary power to confirm it. What they could not make, they cannot confirm. A void act can never become valid, merely because it remains unquestioned."

² *Infra*, § 648 *et seq.*

³ *Infra*, § 789.

Upon the same principle, it follows that the shareholders and directors of a corporation cannot, by their ratification, give validity to a misapplication of funds or property held by the corporation in trust. So a sale, lease, or mortgage of property acquired by a railroad company by exercise of the power of eminent domain, being in violation of the rights of the State unless expressly authorized, cannot be made valid by unanimous ratification of the shareholders.¹ However, the shareholders of a railroad company may by their ratification or acquiescence cure the invalidity of a perpetual lease of their railroad, so far as this results from the absence of authority in the majority or the directors to bind them by such a lease; and if the State should also give its consent to the lease, all question of its validity would be removed.²

§ 621. **The Doctrine applied to Municipal and Charitable Corporations and Savings Banks.** — The doctrine of ratification can seldom be invoked to cure the invalidity of unauthorized acts of officers of a municipal corporation. The officers of a municipality are public officials, whose powers are conferred by law,³ and an act in excess of these powers can be legalized and rendered valid only by the State, through its legislature. The superior officers of a municipality may in some instances have power to cure informalities in the acts of subordinate officers, but it is clear that they cannot legalize any violation of the charter or law enacted for the government of the municipality.⁴

The property and funds of a charitable corporation are held by it in trust, for the special uses prescribed by the donors, or the general uses indicated by the charter. It is clear that neither the members of such a corporation nor the officers whom they have appointed can by their ratification validate any violation of the trusts subject to which the property and funds held by the corporation were granted.

¹ *Infra*, §§ 691, 1120.

³ See *supra*, § 3.

² *Boston, &c. R. R. Co. v. New York, &c. R. R. Co.*, 18 R. I. 260. Compare *Peterborough R. R. Co. v. Nashua, &c. R. R. Co.*, 59 N. H. 385.

⁴ *San Diego Water Co. v. San Diego*, 59 Cal. 517; *McCracken v. San Francisco*, 16 Cal. 592; *Zottman v. San Francisco*, 20 Cal. 96.

A similar rule applies to savings banks. The funds of a savings bank in equity belong to its depositors, and must be administered for their benefit.¹ The depositors impliedly consent that the funds contributed by them shall be used for the purposes indicated by the charter of the bank, but they do not consent to any diversion of the funds from these purposes. Any unauthorized use of these funds is in excess of the powers delegated by the depositors to the corporate body, or any of its representatives. It follows for this reason, that the doctrine of ratification can seldom be applied to dealings of the officers of a savings bank which are in excess of the chartered purposes of the institution. Such dealings can be ratified only by the depositors in the bank, who are the real principals in interest, and owners of the corporate funds. It is evident that the ratification of an act by all the depositors in a savings bank could seldom be shown.

§ 622. *Acts in Violation of the Charter cannot be ratified by any Agent of the Corporation.* — No *agent* of a corporation has authority to ratify an act which involves a violation of the company's charter; an attempt on the part of any agent of a corporation to ratify an act in violation of its charter would be wholly ineffective. Even the majority at a shareholders' meeting cannot ratify an act in violation of the company's charter, for the powers of the majority are derived wholly from the charter itself.²

In *Hazard v. Durant*,³ a suit in equity was brought by a shareholder in a corporation, to compel its president to account for funds belonging to the company, which he had converted to his own use. Objection was made, that the bill would not lie, because the company or the majority might ratify the president's act. But the Supreme Court of Rhode Island said: "To hold that a corporation could gratuitously condone or release such a fraud, by anything short of unanimous consent, would be monstrous; for it would be in effect to hold that a president or director who can control a majority vote in the corporation may rob or despoil it with

¹ *Supra*, § 391.

³ 11 R. I. 196.

² *Infra*, § 641 *et seq.*

impunity. . . . A majority, in our opinion, could no more condone such a wrong gratuitously, than it could originally have sanctioned it.”¹

In *Marsh v. Fulton County*, it was contended that certain bonds issued by the County Court of Fulton County, without the previous sanction of the qualified voters of the county, as required by law, had been ratified by the supervisors of the county. But the Supreme Court of the United States held that the supervisors had no power to ratify the act of the County Court. Justice Field said: “A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance, without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization.”²

§ 623. *Ratification by the Shareholders of an Alteration of the Charter.* — If the shareholders, who constitute the corporate association, unanimously acquiesce in or ratify an act performed by an agent or board on behalf of the corporation, no further question as to the extent of the powers delegated to the agent or board can arise. Ratification by all the shareholders would not cure the *illegality* of an act which is prohibited by

¹ *Per* Potter, J., in *Hazard v. Durant*, 11 R. I. 196, 207. See also *Wall*, 676, 684. See also *Ryan v. cases supra*, § 249; *Chamberlain v. Lynch*, 68 Ill. 160; *Salem Bank v. Pacific Wool Growing Co.*, 54 Cal. Gloucester Bank, 17 Mass. 1, 27-30; 103; *Thomas v. Brownsville, &c. Ry. Athensæum Life Ass. Soc. v. Pooley, Co.*, 1 McCrary, 892; *First Nat. Bank v. Drake*, 29 Kans. 311. Compare *Frankfort Bank v. Johnson*, 24 Me. 490.

² *Marsh v. Fulton County*, 10 Wall. 676, 684. See also *Ryan v. Lynch*, 68 Ill. 160; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 27-30; *Athensæum Life Ass. Soc. v. Pooley*, 3 De G. & J. 294; *Tracy v. Guthrie County Agr. Soc.*, 47 Iowa, 27.

the common law or by statute; but it would remove any defect of authority in the agent performing the act, as between himself and the company. After such ratification, the company would become chargeable with the act, to the same extent as if it had originally authorized it to be done.

No act can be more clearly unauthorized than an alteration of the charter or articles of association of a company by the act of merely a portion of its members.¹ Yet if a portion of the shareholders or the directors of a corporation undertake to accept a new charter, or to adopt new articles of association on behalf of the whole company, their acts may be ratified by the remaining members; and ratification may even be implied from mere acquiescence, or a neglect on the part of the dissenting shareholders to restrain the company from departing from its original constitution.²

The same rule undoubtedly applies where there has been an attempt to effect a consolidation with another company, without first obtaining the consent of all the shareholders. Those shareholders who acquiesce in the change cannot afterwards complain, on the ground that the majority, or the board of managers, assuming to act for the whole corporation, had no authority to bind them.³

§ 624. **Acts in Violation of the Charter.**—The same doctrine has been applied in other cases, where there was a plain violation of the charter or articles of association of a company.

*Kent v. Quicksilver Mining Company*⁴ is a leading case of

¹ *Infra*, §§ 645, 646.

² *Martin v. Pensacola, &c. R. R. Co.*, 8 Fla. 370; *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga. 240; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 29; *Centre, &c. Turnpike Co. v. McConaby*, 16 S. & R. 142; *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435; *Vermont, &c. R. R. Co. v. Vermont Central R. R. Co.*, 34 Vt. 2; *Kennebec, &c. R. R. Co. v. Palmer*, 34 Me. 366; *Hayworth v. Junction R. R. Co.*, 13 Ind. 348; *Gifford v. New Jersey R. R., &c. Co.*, 10 N. J. Eq. 176; *Ex parte Booker*, 18 Ark.

346. Compare *Challis's Case*, L. R. 6 Ch. 266; *Perrett's Case*, L. R. 15 Eq. 250; *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 571. See also *Dows v. Naper*, 91 Ill. 44.

³ *Deaderick v. Wilson*, 8 Baxter (Tenn.), 108; *International, &c. R. R. Co. v. Bremond*, 53 Tex. 96.

⁴ *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; and see further concerning this case, *supra*, § 463. See also *Lockhart v. Van Alstyne*, 31 Mich. 76; *Branch v. Jesup*, 106 U. S. 468, 481.

this character. The majority, at a meeting of the shareholders of a corporation, adopted a resolution authorizing any member to convert his shares into preferred shares, upon paying a certain bonus to the company. A large number of shares were accordingly reissued as preferred shares. After the lapse of four years, during which the preferred shares were quoted daily in the public prints, and were mentioned in the annual reports of the directors, a member who had retained his original shares brought suit to restrain the company from according any preference to the holders of the preferred shares. But the Court of Appeals of New York decided that all the shareholders must be deemed to have had notice of the action of the majority, and to have ratified it by their acquiescence.

The same principle was reaffirmed in *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co.*¹ In that case it appeared that the trustees of a manufacturing company had assigned and transferred all of its property in settlement of a judgment against the company. It was claimed that the trustees had no authority to make the transfer; but the Court of Appeals said: "If all the stockholders of this corporation had, with full knowledge, subsequently ratified the transfer and affirmed the settlement, the act — though beyond the power given the trustees by the charter — could not be subsequently avoided by the stockholders, or by the corporation. This case falls within the rule established by this court in the case of *Kent v. The Quicksilver Mining Company*."²

*Phosphate of Lime Co. v. Green*³ is another important case involving the same principle. The directors of a *limited* company entered into an arrangement with a shareholder, amounting to a purchase of his shares, although the articles of the company contained an express provision that the com-

¹ 90 N. Y. 607.

² *Per* Tracy, J., in *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking, &c. Co.*, 90 N. Y. 607, 618.

³ L. R. 7 C. P. 48. See also *Brotherhood's Case*, 81 Beav. 365; 81 L. J. Ch. 861; *Evans v. Small-*

combe, L. R. 8 H. L. 249. *Com-*

pare Spackman v. Evans, L. R. 8

H. L. 171; *Houldsworth v. Evans*,

L. R. 8 H. L. 268; *Stanhope's Case*,

L. R. 1 Ch. 161; *Stewart's Case*,

L. R. 1 Ch. 511.

pany should not, under any circumstances, purchase its own shares. The Court of Common Pleas decided that this arrangement, which had been carried out, could not be set aside, since it had been ratified by the shareholders. Brett, J., said: "Taking all the facts into consideration, it seems to me that there was abundant evidence to justify the jury in saying that the company (that is, the shareholders), with knowledge of all the circumstances, ratified and adopted what had been done by the directors."

§ 625. **Misapplication of Funds may be ratified.**— It has been held that, if the directors of a corporation apply the funds of the company to their own use, or misapply them in any manner, the excess of authority, as between the directors and the corporation, may be cured by the unanimous consent or ratification of the shareholders.¹ It has likewise been held, that an unauthorized issue of bonds or negotiable paper of a corporation,² or an unauthorized issue of certificates for paid-up shares,³ or an unauthorized conveyance,⁴ may be made binding upon the corporation by the unanimous ratification or consent of its shareholders.

A similar rule undoubtedly applies to acts of the majority, or of other agents of the corporation, which are not binding on account of a failure to comply with formalities prescribed by the charter or by-laws of the company. Thus, the transactions of a shareholders' meeting held outside of the State in which the corporation was chartered may be ratified by subsequent acquiescence.⁵

§ 626. **Ratification by the Majority.**— The majority at a meeting of the shareholders of a corporation are impliedly in-

¹ *Eastern Counties Ry. Co. v. Co. v. West*, 50 Iowa, 16; *Chaffee Hawkes*, 5 H. L. Cas. 331, 357; *v. Rutland R. R. Co.*, 55 Vt. 110.

Watts's Appeal, 78 Pa. St. 370; ² *Parsons v. Hayes*, 14 Abb. N. C. 419; and see *supra*, § 290.

Gray v. Chaplin, 2 Russ. 126; *Hotel* ⁴ *Chouteau v. Allen*, 70 Mo. 290.
Co. v. Wade, 97 U. S. 13; *Twin* ⁵ *Ohio, &c. R. R. Co. v. McPherson*, 35 Mo. 13; *Freeman v. Machias*
Lick Oil Co. v. Marbury, 91 U. S. ⁵ *Water Power, &c. Co.*, 38 Me.
587; *Railroad Co. v. Howard*, 7 Wall. 393, 415.

³ *Tyrell v. Cairo, &c. R. R. Co.*, 345; *Humphreys v. Mooney*, 5 Col. 7 Mo. App. 294; *Des Moines Gas* 282.

vested with authority to elect officers for the corporation, and to exercise a general supervision over the management of its affairs. The majority may also, as a general rule, ratify acts performed without their authority, if they might have authorized the performance of the acts in question in advance.

Thus, if the directors of a company, without authority, increase the amount of its capital by issuing new shares, the issue of new shares may be validated subsequently by a vote of the shareholders at a general meeting, provided the majority could have originally authorized the new issue to be made.¹

So a transaction in which the directors have no authority to represent the corporation because personally interested in obtaining an advantage at the expense of the corporation, may subsequently be ratified by the majority, if the transaction was not in fact fraudulent or detrimental to the corporate rights.²

An informal act of the directors, or an act at a meeting of directors which was not duly called, or at which a quorum were not present, may generally be subsequently ratified.³

It is to be observed, however, that if the charter of a corporation provides that the will of the shareholders shall be declared in a particular manner, or that certain formalities shall be observed by the majority in their corporate

¹ *Sewell's Case*, L. R. 3 Ch. 131; 97 U. S. 13; *Pneumatic Gas Co. v. Payson v. Stoeve*, 2 Dill. 427; *Lane's Case*, 1 De G., J. & S. 504. See also *Supervisors v. Schenck*, 5 Wall. 772, 782; *Aurora Agricult., &c. Soc. v. Paddock*, 80 Ill. 263; *McLaughlin v. Detroit, &c. Ry. Co.*, 8 Mich. 100; *Hayward v. Pilgrim Soc.*, 21 Pick. 270; *Bank of Columbia v. Patterson*, 7 Cranch, 299, 307; *Waldo v. Portland*, 33 Conn. 363; *Arlington v. Peirce*, 122 Mass. 270; *Crump v. U. S. Mining Co.*, 7 Gratt. 352.

² *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Hotel Co. v. Wade*,

Berry, 113 U. S. 322; *Union Pacific R. R. Co. v. Credit Mobilier*, 135 Mass. 367; *U. S. Rolling Stock Co. v. Atlantic, &c. R. R. Co.*, 34 Ohio St. 450; *Buell v. Buckingham*, 16 Iowa, 284, 295.

However, in *Cumberland Coal, &c. Co. v. Sherman*, 30 Barb. 553, 577, it was held that a majority could not ratify a sale of land made by a director to himself. Compare *supra*, § 521.

³ *Reed v. Hayt*, 51 N. Y. Super. Ct. 121.

acts, the majority would have no authority to act in disregard of these provisions, either directly or by a subsequent ratification.

§ 627. **Ratification by the Agents of a Corporation.**—An act which is unauthorized on the part of one agent of a corporation may be within the powers conferred upon another agent; and an act performed by an inferior agent without authority may often be ratified by a higher agent acting on behalf of the company.

Thus, the directors of a corporation may have power to ratify an unauthorized act performed by an inferior agent. In *Fleckner v. Bank of the United States*,¹ the Supreme Court held that a resolution of the directors of a bank, declaring that a certain indorsement made by its cashier had been made by authority of the directors, amounted to a ratification; and Justice Story said: "No maxim is better settled in reason and law, than the maxim, *Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*."

In *Sherman v. Fitch*,² a mortgage executed by the president of a manufacturing corporation was held to have been ratified by the board of directors, by reason of their long-continued acquiescence, with knowledge of the facts; and in *Lyndeborough Glass Co. v. Massachusetts Glass Co.*,³ a similar rule was applied to a purchase of goods by the superintendent of the works of a company. Again, in *Kelsey v. National Bank*,⁴ it was decided that the directors of a bank could ratify

¹ *Fleckner v. Bank of United States*, 8 Wheat. 338, 363; and see *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Anglo-Californian Bank v. Mahoney Mining Co.*, 5 Sawy. 255, 257, affirmed 104 U. S. 192.

² *Sherman v. Fitch*, 98 Mass. 59; and see *Walworth County Bank v. Farmers' L. & T. Co.*, 16 Wis. 629; *Hoyt v. Thompson*, 19 N. Y. 207, 218; *Darst v. Gale*, 83 Ill. 136; *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163; *First National Bank v. Kimber-*

lands, 16 W. Va. 555, 581; *Wood v. Whelen*, 93 Ill. 155; *Chouteau v. Allen*, 70 Mo. 290, 324; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

³ *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; and see *Shaver v. Bear River, &c. Mining Co.*, 10 Cal. 396; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Blen v. Bear River, &c. Mining Co.*, 20 Cal. 602; *Wilson v. West Hartlepool Ry. Co.*, 2 De G., J. & S. 475.

⁴ 69 Pa. St. 426.

the act of its cashier, in offering a reward for the recovery of stolen money.

§ 628. **What constitutes Ratification by the Shareholders.** — The doctrine of ratification must not be confounded with the doctrine of estoppel by acquiescence or laches. Actual ratification of an act involves a voluntary adoption of the act. Full knowledge of the act assented to, and an intention to adopt the act as the act of the corporation, are therefore essential. A corporation can never be charged with an unauthorized act of its agents, on the sole ground that the act has been ratified by the shareholders, unless the shareholders had full knowledge of the act.¹

It is clear, also, that mere lapse of time does not constitute a ratification, though it may be evidence of a ratification. "Length of time may, in many cases, materially assist in establishing the presumption of acquiescence in an act which requires confirmation to give it validity. But then it is not time, but the acquiescence, which changes what would otherwise be a void act into a valid one."²

§ 629. **When Ratification presumed.** — The question whether a particular act has been ratified or acquiesced in can be decided only by reference to all the facts and circumstances of the case. If a contract or other act of an agent of a corporation appears to have been manifestly to the injury of the company at the time of the alleged ratification, clear evidence of ratification should be required; but if a ratification would apparently have been beneficial to the company, a contrary presumption is but reasonable. Thus, very slight evidence

¹ *Hotchin v. Kent*, 8 Mich. 526; *Pottery Co.*, 34 Vt. 144. See *Spackman v. Evans*, L. R. 3 H. L. 171; *Stevenson*, 5 Nev. 224; *Rankin v. Downes v. Ship*, Id. 843; *Houlden v. Evans*, Id. 263. This is assumed in most of the cases cited in the preceding sections.

² *Per Lord Chelmsford in Evans v. Smallcombe*, L. R. 3 H. L. 260; *per Lord Cairnes*, Id. p. 253. See *Ormsby v. Vermont Copper Mining Co.*, 56 N. Y. 623.

Dandridge, 8 G. & J. 248, 323; *Cumberland Coal, &c. Co. v. Sherman*, 20 Md. 117; *Dabney v. Stevens*, 2 Sweeny, 415; *Stark Bank v. U. S.*

of acquiescence is sufficient to give validity to a transfer of real or personal property to an agent who was not authorized to receive it; and ratification may even be presumed without evidence.

In *Bank of the United States v. Dandridge*,¹ Mr. Justice Story said: "Grants and proceedings beneficial to a corporation are presumed to be accepted; and slight acts on their part, which can reasonably be accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact." Lord Ellenborough said: "The law will presume, if nothing appear to the contrary, that every person accepts that which is for their benefit."²

§ 630. **Estoppel by Reason of Acquiescence or Laches of Shareholders.** — If a principal neglects promptly to disavow an act performed on his behalf, without precedent authority, he may become estopped by his silent acquiescence or laches from repudiating the act, although it was not his intention to ratify the act, and he has not actively manifested his assent. The reason of this doctrine is, that a principal ought not to be allowed to speculate at the risk of others on the unauthorized acts of his agents, with the privilege of adopting their acts if the result prove favorable, and of repudiating responsibility in case of loss.

In some instances, a principal may be estopped from repudiating an unauthorized act of which he had no actual knowledge; as where the principal ought by reason of the relation of the parties, to have known of the act, and cannot in equity and good conscience set up his ignorance.

The doctrines may often be applied with very equitable results to unauthorized corporate acts which have been sanctioned by vote of the majority at a general meeting of the

¹ *Bank of United States v. Dandridge*, 12 Wheat. 64, 70. *v. Marbury*, 11 Wheat. 96. *Infra*, § 708 a.

² *Stirling v. Vaughan*, 11 East, 623; and see *Bangor, &c. R. R. Co. v. Smith*, 47 Me. 84; *Owen v. Purdy*, 12 Ohio St. 73; *Talladega Ins. Co. v. Landers*, 48 Ala. 186; *Grove v. Brien*, 8 How. 440; *Brooks* An unauthorized act of an agent must be adopted or rejected *in toto*, it cannot be ratified in part. *Whitwell v. Warner*, 20 Vt. 426, 449-451.

shareholders. A shareholders' meeting is intended to bring together the whole corporation; every member is entitled to be present, and to make known his views. It is not just that shareholders, knowing an act of the majority to be unauthorized, should lie by, and reserve an option to repudiate the act in case of a loss, or to enjoy its benefits if there should be a profit. Fairness in such case demands that the dissenting shareholders should make known their dissent immediately, and take the proper steps to restrain the majority from exceeding the powers conferred upon them.

Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents, by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success.

If a shareholder fails to take the trouble of inquiring into the affairs of the corporation of which he is a member, or to attend its meetings, it seems no more than just that his supineness should be construed as an acquiescence in the proceedings of the majority.¹

§ 631. *The Authorities.* — The authorities are in accordance with these views. It has been held that, if the members of a corporation, having notice of an unauthorized act performed on their behalf by their regular agents, remain silent and take no steps to disaffirm the act, they may generally be charged with the consequences of the act on account of their

¹ In *Tyrell v. Cairo, &c. R. R. Co.*, 7 Mo. App. 294, 299, Hayden, J., said: "As other principals are held liable for the acts, even for the frauds, of their agents, done in the course of the principal's business, it is not easy to see why stockholders who stand by, as did the stockholders here, refusing to hold a meeting, and availing themselves of the benefits of the director's actions, should be allowed to repudiate the corre-

sponding burden. Ample time was given to the stockholders here concerned to meet and disown the action of the agents whom they had selected to carry on their business, and their ratification is not less effectual than if a meeting had been held, and a formal vote taken. Upon them was imposed the legal obligation to act, and they refused to do so." See also *Chouteau v. Allen*, 70 Mo. 290.

acquiescence or ratification.¹ "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result: if it be favorable and profitable to themselves, to abide by it and insist on its validity, but if it prove unfavorable and disastrous, then to institute proceedings to set it aside."²

In *Riche v. Ashbury Railway Carriage, &c. Co., Channell, B.*, said: "In order to bind the defendant company, it is necessary that every member of the company should, with knowledge of the excess of authority on the part of the directors, have so conducted himself as to entitle the plaintiff to assume that he assented to what was being done. If, however, any member, knowing what was going on, chose to absent himself from the meeting, and to leave it to the more active members to decide what was the best course to take, he is, in my judgment, bound by their action, or inaction, as if he had attended the meeting himself."³

In *Kent v. Quicksilver Mining Co.*,⁴ Folger, J., delivering the opinion of the court, said: "Where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there it is not

¹ *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Evans v. Smallcombe*, L. R. 3 H. L. 256, 260, *per* Lord Cairns; *Gordon v. Preston*, 1 Watts, 385.

² *Per* Sir John Romilly in *Gregory v. Patchett*, 33 Beav. 602; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Insurance Co. v. McCain*, 96 U. S. 84; *Hotel Co. v. Wade*, 97 U. S. 18; *Perkins v. Portland, &c. R. R. Co.*, 47 Me. 591; *Kitchen v. St. Louis, &c. Ry. Co.*, 69 Mo. 224, 264; *First Nat. Bank v. Fricke*, 75 Mo. 178. See also *State v. Van Horne*, 7 Ohio St. 332; *Town of Bennington v. Park*, 50 Vt. 178, 209; *Burlington, &c. R. R. Co. v. Stewart*, 39 Iowa, 267. Compare *Cum-*

berland Coal, &c. Co. v. Sherman, 30 Barb. 553; *Baltimore v. Reynolds*, 20 Md. 1.

³ L. R. 9 Exch. 224, 232; and see the judgment of Martin, B., on p. 245. See also *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Spackman v. Evans*, L. R. 3 H. L. 220, *per* Lord St. Leonards, and p. 239, *per* Lord Romilly.

⁴ 78 N. Y. 187. As to the facts of this case, see *supra*, § 624. A similar rule was laid down in the following cases: *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. 381, 400; *Thompson v. Lambert*, 44 Iowa, 239, 247; *Society for Savings v. City of New London*, 29 Conn. 174; *Watts's Appeal*, 78 Pa. St. 370.

needed that there be an express assent thereto on the part of the stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss."

§ 631 *a*. *When the Corporation is not barred.* — The application of these doctrines necessarily depends, in each case, upon all the peculiar circumstances. The equity of the case must be determined. It is necessary to consider the character of the act with which it is sought to charge the corporation, the importance of the act, and the degree of publicity which was given to it. The good faith or bad faith of the parties, and their business relations, are also important considerations. The doctrine of estoppel by reason of laches can never be invoked in order to accomplish a fraud upon innocent shareholders, or to bring about an inequitable result.¹

This view was taken by the Supreme Court of the United States, in *Pacific Railroad Co. v. Missouri Pacific Railway Co.*² In that case, a bill in equity was filed by a railway company to set aside a decree of foreclosure of a mortgage on its road, on the ground that the decree had been obtained through the fraudulent mismanagement of the foreclosure suit by its solicitor and board of directors. It was claimed on the part of the defendant that the complainant was barred by reason of its laches, and the acquiescence of its stockholders, but the Supreme Court held that there was no sufficient ground for holding the complainant to be barred of its rights. Justice Blatchford, delivering the opinion, said: "The plaintiff

¹ *Thomas v. Brownsville, &c. Ry. Co.*, 1 *McCrary*, 892.

² *Pacific R. R. Co. v. Missouri Pacific Ry. Co.*, 111 U. S. 505.

cannot be concluded by the failure of any number of its stockholders to do what unfaithful directors ought to have done, unless a case is shown of such acquiescence, assent, or ratification as would make it inequitable to permit what has been done to be set aside, or unless the rights of innocent purchasers have subsequently intervened, to an extent creating an equitable bar to the granting of relief. The bill in this case does not show such a state of things. While stockholders, more or less in number, may be allowed to interpose, if they have the means or the inclination to take upon themselves the burden of such gigantic controversies as are involved in the railroad transactions of the present day, it would go far to legalize condonation of such transactions as are set forth in this bill, if mere knowledge by helpless stockholders of the fraudulent acts of their directors were to prevent the corporation itself from seeking redress of its acts promptly, when free from the control of such directors. Fruitlessly requesting unfaithful directors to resign, and to employ other counsel, so far from throwing on the stockholders the peril of losing their rights, represented by the company, if they do not personally assert them in place of the directors, operates of itself, without more, only to aggravate the wrong."

§ 632. **Executed Transactions.** — It has been held, in some of the cases, that after a transaction with the agents of a corporation has been fully executed, and the corporation has had the resulting benefits, the corporation cannot repudiate the transaction, although it may have been in excess of the company's charter. These cases can be supported only on the theory that the acts of the agents had been ratified by the shareholders, or that the passive acquiescence of the shareholders operated as an estoppel by reason of laches. The fact that an act in excess of the charter of a corporation has been fully executed, may dispose of the objection that it involved an unauthorized exercise of corporate power;¹ but it would not dispose of the objection that the act was in excess of the authority delegated to the agent performing it.²

¹ *Infra*, § 689 *et seq.*

² *Supra*, § 581.

However, after a corporation has enjoyed the benefit of a contract, or other arrangement made in good faith, with any of its regular agents, it is but fair that every reasonable presumption should be made in order to hold the transaction binding upon the company. Under these circumstances, the acquiescence of the shareholders may often be presumed.¹

§ 633. **Proof of Ratification.**—The question whether an unauthorized act has been ratified by the members of a corporation is a question of fact to be decided by a jury in a court of law. It is not necessary, for this purpose, that an act of ratification be shown on the part of every individual shareholder; but proof of circumstances from which the court or jury can reasonably infer that the act in question was generally known among the shareholders, and was acquiesced in by them, will constitute at least *prima facie* evidence of ratification. In many cases knowledge may be presumed from circumstances, and assent may be implied from silence or a failure to act.²

In those cases in which the doctrine of estoppel can be invoked to charge all the shareholders of a corporation with acquiescence in acts which they ought to have known, and which they cannot in justice be allowed to repudiate, proof of the facts on which the estoppel is based is sufficient to charge the corporation.³

The ratification by a corporation, acting through one of its

¹ Port of London Ass. Co.'s Case, 5 De G., M. & G. 465, 481, *per* Turner, L. J.; Kitchen v. St. Louis, &c. Ry. Co., 69 Mo. 224, 225; Kent v. Quicksilver Mining Co., 78 N. Y. 159, 185; Allegheny City v. McClurhan, 14 Pa. St. 83; Rich v. State Nat. Bank, 7 Neb. 209; Whitwell v. Warner, 20 Vt. 426; Noyes v. Rutland, &c. R. R. Co., 27 Vt. 110; Gold Mining Co. v. National Bank, 96 U. S. 640; 2 Col. 259; Sanderson v. Iron & Nail Co., 84 Ohio St. 442; Bradley v. Ballard, 55 Ill. 413, 419; Smith v. Hull Glass Co., 11 C. B. 897, 926, *per* Jervis, C. J.; Anglo-Australian, &c. Co. v. British Prov., &c. Soc., 3 Giff. 534; Episcopal Char. Soc. v. Episcopal Church, 1 Pick. 372; State v. Smith, 48 Vt. 288; Lee v. Pittsburgh Coal, &c. Co., 56 How. Pr. 373.

² Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43, 61; Riche v. Ashbury Ry., &c. Co., L. R. 9 Exch. 224, 232, *per* Channell, B.; First Nat. Bank v. Reed, 36 Mich. 263; Tyrell v. Cairo, &c. R. R. Co., 7 Mo. App. 294, 299; and see cases cited in the preceding sections.

³ See cases *supra*, § 630.

agents, of an unauthorized act performed by an inferior agent, may be shown in the same manner as a ratification by the company directly. Acquiescence is good evidence of consent; and if the agents of a corporation who have power to ratify an unauthorized act performed by another agent manifest no dissent, after having received full notice, a ratification of the act may often be presumed.¹

§ 634. **Ratification of Informal Acts.** — Provisions in the charter of a corporation directing certain formalities to be observed in the managing of the corporate affairs constitute a portion of the fundamental agreement between the shareholders, and, if intended to be obligatory, cannot be disregarded without unanimous consent. Persons dealing with an agent of a corporation may in many instances assume that all formalities prescribed by the charter have been complied with.² And where the corporation has had the benefit of an act performed by an agent in disregard of a mere formality, slight evidence will usually be sufficient to establish ratification by the shareholders, or an estoppel by reason of laches.³

§ 635. **How informal Acts may be ratified.** — It is to be observed, that a provision in a charter requiring a certain formality in the formation of a contract, does not necessarily make such formality essential to the ratification of a contract already formed. And the superior agents of a corporation

¹ *Gold Mining Co. v. National Bank*, 96 U. S. 640; 2 Col. 248, 565; *Anglo-Californian Bank v. Mahoney Mining Co.*, 5 Sawy. 255, 257, affirmed 104 U. S. 192; *Payson v. Stoever*, 2 Dill. 427; *Walworth County Bank v. Farmers' L. & T. Co.*, 16 Wis. 629; *Blen v. Bear River, &c. Mining Co.*, 20 Cal. 602; *Chicago, &c. Ry. Co. v. James*, 24 Wis. 388; *Peterson v. Mayor, &c.*, 17 N. Y. 449; *Bennett v. Maryland Fire Ins. Co.*, 14 Blatchf. 422; *Darst v. Gale*, 83 Ill. 136; *Chicago Building Soc. v. Crowell*, 65 Ill. 453; *Perry v. Simpson, &c. Manuf. Co.*, 37 Conn. 520; *Pacific*

R. R. Co. v. Thomas, 19 Kans. 256; *New Hope, &c. Bridge Co. v. Phenix Bank*, 3 N. Y. 156; *Phillips v. Campbell*, 43 N. Y. 271; *Bank of Pennsylvania v. Reed*, 1 W. & S. 101; *Hilliard v. Goold*, 84 N. H. 230.

² *Supra*, § 610 *et seq.*

³ *Walters's Case*, 3 De G. & Sm. 149; *Walton's Case*, 26 L. J. Ch. 545; *Bargate v. Shortridge*, 5 H. L. C. 297; *In re Port of London Ass. Co.*, 5 De G., M. & G. 465; *Bulkley v. Derby Fishing Co.*, 2 Conn. 255, 256. See *Dana v. Bank of St. Paul*, 4 Minn. 385; *Seeley v. Morgan*, 49 N. Y. Super. Ct. 346.

may have authority to dispense with formalities which are made obligatory upon inferior agents.

*Reuter v. Electric Telegraph Co.*¹ was a case of this character. By the deed of settlement of a corporation formed under a royal charter, the board of directors were invested with a general authority to conduct the affairs of the company; all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the company under the authority of a special meeting. The company was sued upon a contract above the prescribed value, which had been made by the chairman verbally. Upon an agreed statement of facts, the Court of Queen's Bench held that the contract, executed by the chairman without authority, had been rendered binding upon the company by the subsequent acquiescence of the board of directors.

The same rule was applied in *Beecher v. Marquette Rolling Mill Co.*² The general law of Michigan regulating manufacturing corporations, contained a provision that no mortgage of the property of such a company should have any force or effect, unless expressly authorized by the vote of three fifths in interest of the stockholders, at a meeting called in a prescribed manner. A mortgage was executed on behalf of a company governed by this law, pursuant to a vote of three fifths in interest of the stockholders, but the meeting at which the vote was taken had not been called in the prescribed manner. The Supreme Court, however, held that the mortgage was binding; that the statutory provision which had been disregarded, did not concern the public at large, and was merely a regulation for the benefit of the stockholders, and that the latter could waive the informality. Cooley, J., said: "The corporators may possibly have had a right to take advantage of the exact words of the statute, repudiate their action, and treat the mortgage as of no force or effect, but they had an equal right to treat it as effective and valid. They have chosen the latter course, and this is conclusive upon the corporation, and upon any one claiming under it."

¹ *Reuter v. Electric Telegraph Co.*, 6 El. & Bl. 841. ² 45 Mich. 103, 109; and see as to the same case, *infra*, § 655.

A similar rule was applied in New York, under a law requiring the execution of a mortgage upon the property of a corporation, to be approved in writing by the holders of two thirds of the capital stock of the company.¹

§ 636. **Effect of a Failure to observe Formalities in the Appointment of Agents.** — No agent of a corporation, nor even the majority at a meeting of the shareholders, can appoint inferior agents without complying with every formality which the charter or articles of association and general laws prescribe. An attempt to elect or appoint an agent without complying with the prescribed formalities, being in excess of the powers delegated to the appointing or electing agent, does not of itself confer any authority whatsoever upon the agent so chosen.²

It should be observed, however, that acts performed by a person assuming to act as agent for another, under an invalid election or appointment by another agent, may nevertheless be binding upon the principal. There are several rules of law which may bring about this result.³

§ 637. **Persons dealing with Agent without Notice may assume that Formalities of Appointment were complied with.** — If a person is held out as the agent of a corporation, by superior agents who might have properly appointed him, a party dealing with such agent in good faith is entitled to assume that a regular appointment was made; and the corporation will be liable in such case, although the agent was not appointed in the manner prescribed by the company's charter. Thus, "if a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts as cashier will bind the corporation, although no written proof is or can be adduced of his appointment."⁴

¹ Rochester Savings Bank v. Averell, 96 N. Y. 467, 474.

² See *supra*, § 583.

³ *Supra*, §§ 585, 618; and see the following sections.

⁴ *Per* Mr. Justice Story in Bank of U. S. v. Dandridge, 12 Wheat. 64, 70; Insurance Co. v. McCain,

96 U. S. 84; Minor v. Mechanics' Bank, 1 Pet. 46; Baird v. Bank of Washington, 11 S. & R. 414, 415; Lester v. Webb, 1 Allen, 34; Union Mining Co. v. Rocky Mt. Nat. Bank, 2 Col. 248; and see Beers v. Phoenix Glass Co., 14 Barb. 358; Allen v. Citizens' Steam Nav. Co., 22 Cal.

The same doctrine was expressed in an English case, as follows: "The company is bound by what takes place in the usual course of business with a third person, where that third person deals *bona fide* with persons who may be termed *de facto* directors, and who might, so far as he could tell, have been directors *de jure*." ¹

After a corporation has invested an agent with apparent authority to represent it, persons dealing with such agent may rely upon this apparent authority until they have received notice, in some way, that the authority has expired, or has been revoked. ²

§ 638. **An Informal Appointment may be ratified by the Corporation.**—An unauthorized appointment or election of an agent of a corporation by superior agents, or by the majority, may subsequently be ratified by the corporation. Slight evidence is sufficient to establish a ratification of an appointment or election which was invalid on account of a mere informality. If a person has been allowed to act habitually as agent of a corporation, a regular appointment may be presumed; and any laches of the corporation or its shareholders, in repudiating an agent whose appointment was irregular, is often sufficient to create an estoppel against the corporation. ³

28; Alabama, &c. R. R. Co. v. Kidd, Mill Co., 36 Me. 78; Penobscot, &c. 29 Ala. 221; Town of Concord v. R. R. Co. v. Dunn, 39 Me. 587; Waite Concord Bank, 16 N. H. 26. v. Windham County Mining Co., 36

¹ Per Gifford, L. J., in *Re County- Vt. 18; Allen v. Citizens' Steam Life Ass. Co.*, L. R. 5 Ch. App. Nav. Co., 22 Cal. 28; Charitable Ass. 288, 293; Hackensack Water Co. v. v. Baldwin, 1 Metc. (Mass.) 359; De Kay, 36 N. J. Eq. 548, 559; Smith v. State Bank, 18 Ind. 327; Mahony v. East Holyford Mining Co., L. R. 7 H. L. 869. Browning v. Great Central Mining Co., 5 H. & N. 856; Smith v. Hull

² Insurance Co. v. McCain, 96 Glass Co., 11 C. B. 897. See also U. S. 84, 86; San Jose Savings Minor v. Mechanics' Bank, 1 Pet. Bank v. Sierra Lumber Co., 63 Cal. 46; Beers v. Phoenix Glass Co., 14 179. Compare Lebanon, &c. Gravel Barb. 358; Elwell v. Dodge, 33 Road Co. v. Adair, 85 Ind. 244. Barb. 336; Vernon Society v. Hills,

³ See Goodwin v. Union Screw 6 Cow. 23; Farmers' Mut. Ins. Co. Co., 34 N. H. 378; Ohio, &c. R. R. v. Taylor, 73 Pa. St. 342; Union Co. v. McPherson, 35 Mo. 13; South- Bank v. Call, 5 Fla. 409; State Bank gate v. Atlantic, &c. R. R. Co., 61 v. Chetwood, 3 Hal. (N. J. L.) 1; Mo. 89, Sampson v. Bowdoinham Mechanics' Nat. Bank v. Burnet

For this reason, it has been held that, if the shareholders in a corporation allow a person to act as director, although not eligible to that office according to the provisions of the charter, acquiescence in the appointment may be presumed. "If the officers selected are ineligible, or are elected irregularly or illegally, but are allowed by the proprietors of the corporation to take control of its property and to exercise its functions and powers, they become officers *de facto*, and as such may act for and bind the corporation."¹ A corporation may thus become liable, by the acquiescence of its shareholders, upon a contract made by directors who were ineligible according to the express terms of the statute under which the corporation was formed.² So, if the shareholders of a corporation allow a board of directors to hold over after their term of office as fixed by the charter has expired, and neglect to choose a new board, the corporation will be bound by the acts of the directors so holding over.³

§ 639. The courts will not, as a rule, investigate the regularity of the election or appointment of an officer of a corporation where the corporation itself and the shareholders do not question the agent's authority. Under these circumstances, ratification or acquiescence on the part of the corporation will be presumed. Thus, if a suit is instituted on behalf of a corporation by its acting officers, the regularity of their appointment or election will not be investigated if the corporation acquiesces in their action.⁴

§ 640. *Officers de facto and de jure.* — The expressions "*officer de facto*" and "*officer de jure*" have in many instances been applied to directors and other managing agents of private

Manuf. Co., 32 N. J. Eq. 236.

Compare *Clark v. Farmers' Woollen*

Manuf. Co., 15 Wend. 256.

¹ *Mechanics' Nat. Bank v. Burnet Manuf. Co.*, 32 N. J. Eq. 236,

238. See also *Ehrman v. Union*

Central Ins. Co., 35 Ohio St. 324;

Atlas National Bank v. Garduer

Co., 8 Biss. 537; *Despatch Line v.*

Bellamy Manuf. Co., 12 N. H. 205.

² *Delaware, &c. Canal Co. v.*

Penn. Canal Co., 21 Pa. St. 131.

³ *Thorington v. Gould*, 59 Ala.

461.

⁴ See *Mechanics' Nat. Bank v.*

Burnet Manuf. Co., 32 N. J. Eq.

236, 238; *Charitable Ass. v. Bald-*

win, 1 Metc. (Mass.) 359; *Green v.*

Cady, 9 Wend. 414.

corporations. The expression officer *de facto* has been used to designate an agent actually occupying the position claimed by him, and exercising its incidental powers; it is said that only the rightful representatives of the corporation, under a proper election or appointment, are officers *de jure*.

The use of these expressions has been unfortunate, as it has led to confusion by reason of the application of the same terms to government officers and public officials.

It has sometimes been suggested that a *de facto* officer of a private corporation occupies a position similar to that of a *de facto* government officer, or other public official, in possession of his office under color of right.¹ But the two cases rest on different principles.² Directors and other managers of a private corporation are merely agents, and the corporation can be charged with their acts only in accordance with the established doctrines of the law of agency. It is clear, that,

¹ See *Walker v. Flemming*, 70 N. C. 484; *Central Trust Co. v. Wabash, &c. R. R. Co.*, 28 Fed. Rep. 858.

"A corporation may act by means of an officer *de facto* as fully and effectually, as regards the public and third persons, as by an officer *de jure*." *Per Sergeant, J.*, in *McGargell v. Hazleton Coal Co.*, 4 W. & S. 425. And see *Anglo-Californian Bank v. Mahoney Mining Co.*, 6 Reporter, 705 (U. S. C. C.), 5 Sawy. 256, affirmed as *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192.

² In *Despatch Line v. Bellamy Manuf. Co.*, 12 N. H. 223, *Parker, J.*, said: "If this election had been by a municipal corporation, coming into office under color of an election, he would have been an officer *de facto*, and his acts valid so far as third persons had an interest in them. And the regularity of the election could not in such case be inquired into, except in some proceeding to which he was a party.

As a director of a private corporation, although called in common parlance an officer of the corporation, he is perhaps not technically to be considered an officer *de facto*. He is one of the agents elected by vote of the corporation, for the management of its affairs, or some of them. But a similar rule must prevail in relation to the effect of his acts, so far as the corporation have held him out as an agent, and third persons have confided in his acts, done within the scope of the authority he appeared to possess."

In *Litchfield Iron Co. v. Bennett*, 7 Cowen, 234, the Supreme Court of New York decided that evidence of general reputation was not sufficient to prove who were the directors of a company. *Sutherland, J.*, said: "This is a matter of private right, and must be decided by the ordinary rules of evidence. The directors are in no sense public officers." See also *Johnston v. Jones*, 28 N. J. Eq. 216.

if a person assumes to act as agent for another without any authority, he does not thereby become the agent of such person either in fact or in law. An agency can never be created by the act of the agent alone. It is clear also, that an appointment made by another person, assuming to act as agent for the common principal, does not bind the latter unless the appointing agent had authority. Hence, if a person assumes to act as agent of a corporation under an informal, and therefore unauthorized, appointment by a superior agent, the corporation will not be responsible for the acts of the person so charged, unless by application of the rules discussed in the preceding sections.

The validity of acts performed by a public officer, actually in the exercise of the powers and duties of the office claimed by him, rests on a distinct rule of law. In order to secure the peaceful and orderly government of the community, the rule has been established that the right of a *de facto* public officer to exercise the powers of his office cannot be investigated in a collateral proceeding. It must be determined once for all times, in a direct proceeding to oust the officer.¹

PART II.

THE RESPONSIBILITY OF A CORPORATION FOR THE ACTS OF THE MAJORITY.

§ 641. **General Principles.** — Every act of an association, whether incorporated or not, must necessarily be the act of all the members who compose the association. A partnership act is an act performed by the partners jointly; and an act of a corporation means an act of the corporators performed in a corporate capacity: in both cases every act of the whole association must be the act of all of its members.

It is not necessary, however, that all the members of an association shall personally join in performing an act, in order

¹ See *Conway v. St. Louis*, 9 Mo. App. 488. See also *supra*, § 543 a.

to make it legally binding upon them all: they may delegate authority to others to bind them by acting as agents on their behalf. Upon this principle, and for obvious reasons of convenience, it has always been a rule, applying both to corporations and to partnerships, that every member of such an association impliedly agrees that a majority of members shall have power to bind him by their vote, so long as they act within the express or implied terms of the charter or partnership agreement. From this it follows, as a legal consequence, —

“First. That, within the limits set by the original constitution of a partnership or company, the voice of the majority must prevail.

“Secondly. That it is not competent for any number of partners or shareholders, less than all, to pass beyond those limits.”¹

The same principles apply with full force to corporations. “Incorporated companies are subject to the same principle which prevails in the community at large, that the acts of a majority, in cases within their charter powers, are obligatory on the minority. The general rule on the subject is well expressed by Chief Justice Tilghman. He says: ‘The fundamental principle of every association for self-government is, that no one shall be bound, except with his own consent, expressed by himself or his representatives; but actual assent is immaterial, the assent of the majority being the assent of all; and this is not only constructively true, but actually true; for that the will of the majority shall in all cases be taken as the will of the whole, is an implied, but essential, stipulation in all associations of this sort.’”²

For the purpose of carrying out the corporate enterprise, the majority of stockholders are authorized to act as agent for the remainder; and the voice of the majority is the voice of the corporation. But in matters outside of the corporate enterprise the individual corporators have not authorized the

¹ 1 Lindley on Partnership (4th ed.), 608. *re* St. Mary's Church, 7 S. & R. 517; *Dudley v. Kentucky High*

² *Per* Chief Justice Smith in *New School*, 9 Bush, 578; *Stevens v. Orleans, &c. R. R. Co. v. Harris*, 27 Rutland, &c. R. R. Co., 29 Vt. 545. *Miss.* 587; *per* Tilghman, C. J., *In Supra*, § 474.

majority to act for them ; and it follows that in those matters the majority cannot represent the corporation. The majority are not the corporation itself, but only its agent or spokesman.¹

§ 642. The charter of a corporation serves a twofold purpose. It contains the terms upon which the corporators have agreed to associate, and therefore gives the measure of authority which a majority can exercise ; and it also fixes the limits within which the body of corporators can lawfully act in a corporate capacity. Any act which is not authorized by the charter is therefore usually, at the same time, in excess of the powers delegated to the majority as agent of the corporation, and also in excess of the corporate powers which the association can lawfully exercise.²

The distinction between the delegated authority of a majority and the corporate authority granted by law is of much importance, on account of its bearing upon the legal validity of corporate acts. In the one case, the doctrines of the law of agency apply, while in the other case the question is as to the legal effect of a statutory or common law prohibition. In the former case the familiar rule applies, that an unauthorized act of an agent may be ratified ; in the latter case it has no application. Thus, if the benefits of an unauthorized transaction of the majority were received by the corporation with the knowledge and consent of the other shareholders, this is usually sufficient to show acquiescence or ratification on the part of the whole association. But the unanimous consent of the members of a corporation cannot cure an objection arising out of the absence of a legal right to act in a corporate capacity.³

The powers of a majority are fixed by the express or implied terms of the agreement by which the corporation was formed ; and as all persons who deal with a corporation must be considered to have notice of the contents of its charter, it follows that they must also be considered to have notice of the extent of the powers delegated to a majority.

¹ *Infra*, § 648 *et seq.*

² *Supra*, § 619.

³ *Supra*, Chapter VI.

In many cases, however, the authority of a majority to do a given act depends upon the existence of facts which cannot be gathered from the charter itself. For example, the charter of a bank impliedly authorizes the issue of notes in ordinary banking transactions; but it does not authorize the issue of notes by way of gift, or for the purpose of building a railroad. In this case, a person having notice that notes were issued by vote of the majority for an unauthorized purpose cannot hold the corporation liable; but, in accordance with a well-established rule of the law of agency, the fact that the majority exceeded their powers in issuing the notes would not be a defence against a *bona fide* purchaser for value. The effect of a want of legal right in the corporation itself, to issue notes for a purpose not authorized by its charter, depends upon an entirely different principle.

§ 648. **A Corporation is not bound by unauthorized Acts of the Majority.**—The rule that the majority of an association, whether it be incorporated or not, have no power to bind the association by an act which is not authorized by the provisions of the constitution under which the association was formed, has often been affirmed by the courts. It is a rule resting upon the most elementary principles of the law, and its correctness ought not at this day to be considered a matter for argument.¹

*Natusch v. Irving*² is the leading case in which the rule was established. Lord Eldon there held that a large company formed for the purpose of carrying on the business of life and fire insurance could not, against the will of a single shareholder, embark in the business of marine insurance.

The same point was decided in *Burges and Stock's Case*.³ An attempt had been made to extend the business of a life insurance company to the business of marine insurance, and

¹ The rule is based upon the law of contracts and agency, and is subject to the same qualifications as the analogous rule applicable to the unauthorized acts of the directors of a corporation. See *infra*, § 647.

Livingston v. Lynch, 4 Johns. Ch. 578. See *Pickering v. Stephenson*, L. R. 14 Eq. 340.

² *Burges & Stock's Case*, 81 L. J. Ch. 749; also reported 2 J. & H. 441; *Boston, &c. R. R. Co. v. New*

³ *Gow on Partnership*, App. II; *York, &c. R. R. Co.*, 18 R. I. 260.

a new deed of settlement had been prepared ; but it was executed by only a portion of the shareholders, and the other shareholders had done nothing to bind them to the new course of business. Upon the winding up of the company, an application of the holders of a marine policy to come in as creditors was refused. Vice-Chancellor Page-Wood said : " I need not refer to the cases that show that you cannot bind a single dissentient shareholder to any purpose which is not the original purpose of the company ; and that, if there was a single dissentient shareholder, it would be quite sufficient for the official manager, appearing for all the shareholders, to say that no such claim could be enforced against the company."

§ 644. The principle of this rule applies with the same force to a private corporation as to a partnership or joint-stock company ; for a private corporation, like a partnership or joint-stock company, is a voluntary association. But an additional reason exists why the majority of a corporation should not have the power to bind the corporation to do an act unauthorized by its charter ; if a corporation violates its charter, or exceeds its chartered powers, it becomes liable to a forfeiture of its franchises, and involuntary dissolution at the suit of the State.

It follows, therefore, that no majority of the shareholders of a corporation have the power to make a contract binding upon the company, unless authorized by its charter.¹ Nor can the majority dispose of any portion of the corporate property or funds, except in pursuance of the original agreement of the shareholders. " What the majority determine within the scope of this mutual contract, they each agree to abide by ; but there their mutual contract ends, and no majority, however large, has a right to divert one cent of the joint capital to any purpose not consistent with, and growing out of, the fundamental joint intention."² Hence a purchaser

¹ *Bird v. Bird's Patent, &c. Co.*, L. R. 9 Ch. 358. Compare *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. 395. ² *Kean v. Johnson*, 9 N. J. Eq. 407 ; *Pickering v. Stephenson*, L. R. 14 Eq. 340. See also cases *supra*, §§ 249, 622.

of property belonging to a corporation cannot obtain title through the majority, if he had notice that the transfer was made by the majority without proper authority.¹

Upon the same principle, it follows that the majority can do no valid act in the management of the internal affairs of a corporation, except in strict accordance with the rules laid down by the charter of the company. Thus, they cannot elect a board of directors, or adopt by-laws, at a meeting which has not been duly called, or which is held outside of the State in which the company was formed.²

§ 645. *The Majority cannot effect an Alteration of the Charter.* — A plain illustration of the inability of a majority to exceed the powers conferred by the charter is furnished by those cases in which an attempt was made to accept a new charter, or an amendment to an existing charter, by vote of the stockholders. Here no question of the authority of the company to act in a corporate capacity could arise, since the legislature had given its consent to the change. The only question presented for solution was, Have a majority of the shareholders in a corporation the *power*, by their vote, to accept an alteration of the common charter, on behalf of the company, without having been authorized to do so by unanimous consent? The answer was, that a majority have no such power, and that an alteration cannot be made without the consent of every individual shareholder.³ This follows, necessarily, if a contract can be altered only with the consent of all the contracting parties.⁴ "Everybody knows that, if several men enter into a valid contract, it cannot be fundamentally altered but by unanimous consent. Why should a different rule prevail as between corporators?"⁵

¹ See *Miller v. Ewer*, 27 Me. 509; and compare *infra*, § 708. cept an alteration, on behalf of all, see *supra*, §§ 395-407.

² *Ormsby v. Vermont, &c. Mining Co.*, 56 N. Y. 623; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 839. *Supra*, § 479.

³ Upon the question whether or not a majority have received authority through the charter to ac-

⁴ Compare *Whiteside v. United States*, 93 U. S. 255; *Uteley v. Donaldson*, 94 U. S. 47.

⁵ *Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. 86; *Central R. R. Co. v. Collins*, 40 Ga. 617.

The law applicable to this question was forcibly stated by the Supreme Court of Mississippi in *New Orleans, &c. Railroad Co. v. Harris*.¹ "The rule is unquestioned, that, in partnerships and joint-stock associations, the fundamental articles of copartnership or association cannot be altered by a vote of the majority, against the consent of the minority, unless there is an express or implied provision in the articles themselves that they may do it. This principle is equally applicable to incorporated companies. The charter in these cases constitutes the fundamental articles of the association. . . . It is our opinion, therefore, that the act of acceptance *was absolutely void for want of power* on the part of the stockholders representing a majority of the stock to vote an acceptance of the amendatory act."

§ 646. **The Majority cannot effect a Consolidation with another Company.** — Upon the same principle, it is well settled that corporations cannot be consolidated without the unanimous consent of their shareholders, even though the legislature should authorize the consolidation to be made; for a consolidation would work a fundamental change in the contract of the shareholders. An attempt to effect a consolidation by a majority vote, without the consent of every shareholder, given through the charter or otherwise, is wholly nugatory;² and acts performed under an attempted but void consolidation or alteration are objectionable upon the same grounds as acts performed without any authority whatever.³

In *Lauman v. Lebanon Valley Railroad Co.*,⁴ it was decided that a majority had no power to make a single dissenting shareholder member of a new company formed by consolida-

¹ 27 Miss. 517, 537, 539; *Stevens v. Rutland, &c. R. R. Co.*, 29 Vt. 546; *Zabriskie v. Hackensack, &c. R. R. Co.*, 18 N. J. Eq. 178; *Hoey v. Henderson*, 32 La. Ann. 1069; and see *supra*, § 395.

² *Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. 78, 83; *Tuttle v. Michigan Air Line R. R. Co.*, 35 Mich. 247; *Clearwater v. Meredith*, 1 Wall. 25, 40. *Supra*, § 396.

³ See *New Orleans, &c. R. R. Co. v. Harris*, 27 Miss. 540, 541; *Stevens v. Rutland, &c. R. R. Co.*, 29 Vt. 565; *Pearce v. Madison, &c. R. R. Co.*, 21 How. 441.

⁴ 30 Pa. St. 46, quoted with approval in *Black v. Delaware, &c. Canal Co.*, 24 N. J. Eq. 467. See also *Knoxville v. Knoxville, &c. R. R. Co.*, 22 Fed. Rep. 758.

tion or merger. Chief Justice Lowrie said: "He may object that it is a violation of the contract of association by which he and his associates agreed to become one corporate company for a given purpose; that he united in the association for one purpose, then agreed on, and now the majority are diverting their capital to a different purpose. This is a violation of chartered contracts; not the supposed one between the government and the corporators, but the one between the corporators themselves. He may object that his corporators have *no power* to make a new contract for him, and thereby constitute him a member of a new and different corporation; for it is the very nature of a contract relation that it can be instituted only by the real parties to it; unless it be a mere constructive contract, which is only a convenient form or fiction of law, invented to enforce a corresponding legal duty. He may object that even the legislature cannot authorize this, for by doing so they would authorize the destruction of one private contract, and the compulsory creation of another in its stead."¹

The objection last stated would not apply in England, for the power of Parliament is not limited by constitutional provisions; but the former objection would remain valid. Parliament may imperatively alter the charter of a corporation, and may confer power upon the majority of the corporators to make the alteration; but if Parliament should pass an act merely giving a corporation permission to alter its charter, it would seem that the majority would not have the power to assent to the alteration in the name of the corporation against the will of a single shareholder.²

§ 647. **Qualifications of the General Rule, that unauthorized Acts of the Majority do not bind the Corporation.** — It has been pointed out that the power of the majority, at a meeting of the shareholders of a corporation, to represent the company, and to bind it by their vote, rests upon the implied agreement of all the shareholders, by which the majority are

¹ The power of a State legislature to alter a charter without the consent of the shareholders of the company will be considered *infra*, Chapter XV., § 1093 *et seq.*

² Compare *supra*, §§ 404, 405.

constituted the agent or spokesman of the whole association. The principles of the law of agency apply with full force to the relation between a corporation and the majority acting in its name and on its behalf. The general rule is, that a principal is not bound by acts performed by his agent in excess of the authority conferred; but this rule is subject to two important qualifications.¹ Both the rule and the qualifications of the rule apply to the unauthorized acts of a majority.

Thus, if an act is performed in pursuance of a vote of the majority at a shareholder's meeting, and the majority have apparent power to authorize the act to be done, the corporation will be bound by the act as against a person who in good faith relied upon the apparent power of the majority to authorize it to be done, although the act may have been unauthorized. The authorities on this subject have been discussed, in considering the liability of a corporation for the acts of its ordinary managing agents.²

It is a well-settled rule of the law of agency, that a principal who has ratified an unauthorized act performed by his agents becomes bound thereby. This rule applies to unauthorized acts performed by the majority of a corporation. If a corporation has ratified an act performed by the majority on its behalf, then such act will be treated as the act of the company, although the majority may have exceeded their authority.³

PART III.

THE LEGAL EFFECT OF COMMON LAW AND STATUTORY PROHIBITIONS UPON THE VALIDITY OF CORPORATE ACTS.

General Principles.

§ 648. **Of the Absence of Authority to act in a Corporate Capacity.** — The formation of a corporation is prohibited by the common law unless an act of incorporation or charter has

¹ *Supra*, §§ 578, 579.

² *Supra*, § 585 *et seq.*

³ The authorities upon this point are collated *supra*, § 618 *et seq.*

been passed by the legislature, granting to the corporators the right of forming a corporation, and of acting in a corporate capacity.¹ The extent of the rights granted by an act of incorporation or charter must necessarily depend upon the terms of the grant itself. When the legislature incorporates an association for the purpose of carrying on a particular business in a particular manner, it thereby grants permission to the association to act in a corporate capacity for the purpose of prosecuting the particular enterprise described, and no other. An association which has been authorized by its charter to act in a corporate capacity for the purpose of prosecuting a certain enterprise, and that only, has no better right to act in a corporate capacity in the prosecution of another enterprise, than if it had never been chartered at all.² All corporate acts which the legislature has not authorized remain prohibited by the common law; it is sometimes said that such acts are beyond the corporate powers of the association, or *ultra vires*.

It is obvious that the words *powers* and *vires* are here used in the sense of *authority* or *right*, and not in the sense of *ability*. There is nothing contradictory in speaking of an unauthorized or illegal corporate act. An association is *able* to act in a corporate capacity in excess of its charter, though it would thereby violate the law; the legal effect to be attributed to an unauthorized corporate act depends wholly upon a construction of the common law or statutory prohibition.³

§ 649. It has sometimes been said, that, inasmuch as a corporation is an artificial person or entity, created by law, with only such powers as are conferred by its charter, it can exercise no powers beyond those conferred; and that a con-

¹ *Supra*, §§ 7, 8.

² *Supra*, § 316 *et seq.* Upon the Construction of Charters, see *supra*, Chapter VI.

³ In *National Pemberton Bank v. Porter*, 125 Mass. 335, Lord, J., said: "There is nothing of mystery or of sanctity in the use of the words of a dead language, *ultra*

vires; and although it is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers, still it is as applicable to individual as to corporate action. An illegal act of an individual is as really *ultra vires* as the unauthorized act of a corporation."

tract which is not authorized by the charter of a corporation must therefore necessarily be in excess of its powers, or *ultra vires*, and void.

This reasoning involves a strange confusion of ideas. It has been pointed out that a corporation can be called an artificial person or entity only by the use of figurative language; in reality, it is an association of persons acting collectively.¹ A private corporation is not, strictly speaking, created by law, but is formed like any other association, by its members, under the permission accorded by law.² When it is said that an association is incorporated or invested with corporate powers, this means that the association is invested, by act of the legislature, with a *legal right to exercise* corporate powers, the common law prohibition against the exercise of corporate powers being to that extent repealed. Unauthorized corporate acts are said to be *ultra vires*, not because the power to do those acts has not been granted, but because the exercise of the power is forbidden by the common law. To deny that corporations are able to enter into contracts, and do frequently enter into contracts and do acts in excess of their chartered powers, is to deny an unalterable and self-evident fact.

It would serve no useful purpose to enter upon an historical investigation of the origin and cause of the erroneous ideas which have prevailed on this subject. Much confusion has evidently been caused, in this as well as in other branches of the law of corporations, by a failure to bear in mind the radical difference between public or municipal corporations and private corporations.

Public or municipal corporations are not associations, but are subdivisions of the State. The charter of such a corporation is not a contract between the corporators and the State, nor between the corporators themselves. The effect of an act of the legislature incorporating a municipality is to vest in the voters residing in a certain district of the State powers of local government over all the inhabitants of that district. Such an act, strictly speaking, confers powers which

¹ *Supra*, § 1.

² *Supra*, §§ 7, 24.

did not exist before; it confers upon the majority of voters, and upon the governing officers of the municipality, the powers of levying taxes and passing local laws, without the previous consent of the people of the district. The majority of voters at the municipal elections, and the municipal authorities, have power to bind the inhabitants of the municipality by their acts, solely because the power was conferred by the legislature. Acts in excess of the powers delegated by the legislature may therefore properly be said to be *ultra vires*.

§ 650. It does not follow that, because the exercise of corporate powers is prohibited by the common law, any corporate acts performed in violation of this prohibition will not be recognized by the law as corporate acts. An illegal or prohibited transaction may or may not be recognized at law; it may subject the parties to a penalty, and nevertheless be recognized by the courts, and be given effect after it has been consummated. There is no inconsistency in holding a corporation liable for a tort; yet it is clear that authority to commit a tort, in a corporate capacity, was not conferred by law. So a contract made by a corporation in excess of its chartered powers is not necessarily void. Every essential element of a contract may be there; and the prohibition of the law against unauthorized corporate acts may merely impose a penalty, or render the contract voidable while unperformed.

It is necessary to distinguish between the effect of the absence of an essential element of a contract, and the effect of a legal prohibition from entering into the contract. The existence of a contract is primarily a question of fact; there must in fact be an agreement between the parties. No rule of law can create this agreement where none has been entered into, or unmake an agreement which really exists.

A contract or agreement by its very nature implies the mutual consent of the contracting parties, and to speak of a contract without this mutual consent involves a contradiction in terms. On the other hand, the legal consequences of a prohibition from entering into an agreement of a particular class, and the legal enforceability of such an agreement

if actually entered into, are purely questions of positive law; a prohibited contract must be treated as binding or not binding, or be followed by other legal consequences, according to the purpose and meaning of the legal prohibition.¹

§ 651. These principles must be applied in determining the validity and effect of the contracts of corporate associations. The existence of a contract of a corporation is primarily a question of fact, and must be determined accordingly; whether the contract be legally binding and enforceable depends wholly upon the rules of positive law.

Thus, it has frequently been held that the invalidity of a contract made by a corporation in excess of its chartered powers may be cured by a subsequent act of the legislature.² By such subsequent act the contract is made as valid as if it had been originally authorized. This shows that the want of legislative authority to enter into a contract in a corporate capacity affects the remedy merely, and not the existence of the contract itself; for the legislature would have no power to create a contract between the parties where there was none before.

§ 652. The exercise of corporate powers without legal authority may be prevented or punished by the State, through a proceeding of *quo warranto* or *scire facias*.³ But the im-

¹ A person has no authority to commit a tort or breach of trust, or make an illegal contract, yet he has power to do either. The illegal act may or may not be recognized by the courts; it may be treated as void or voidable, or as valid, and as subjecting the person doing it to a penalty. On the other hand, a contract without the mutual consent of the contracting parties is impossible: to speak of a contract in which such mutual consent does not exist involves a contradiction in terms.

² See *Whitewater, &c. Canal Co. v. Vallette*, 21 How. 414, 425; *St. Louis R. R. Co. v. N. W. St. Louis Ry. Co.*, 2 Mo. App. 69; *Basshor v. Dressel*, 34 Md. 503; *Richards v. Merrimack, &c. R. R. Co.*, 44

N. H. 127; *Shepley v. Atlantic, &c. Ry. Co.*, 55 Me. 395; *Hall v. Sullivan Ry. Co.*, 2 Redf. Am. Ry. Cas. 621; *Shaw v. Norfolk County R. R. Co.*, 5 Gray, 162; *New Haven & Northampton Co. v. Hayden*, 107 Mass. 525; *Black River, &c. R. R. Co. v. Barnard*, 31 Barb. 258; *U. S. Mortgage Co. v. Gross*, 93 Ill. 483; *Mitchell v. Deeds*, 49 Ill. 416; *Illinois Grand Trunk R. R. Co. v. Cook*, 29 Ill. 237; *Goodrich v. Reynolds*, 31 Ill. 491; and compare *Richmond Factory Ass. v. Clarke*, 61 Me. 351, 358; *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 46; *Reiser v. William Tell, &c. Ass.*, 39 Pa. St. 137; *White v. Howard*, 46 N. Y. 165.

³ *Infra*, Chapter XIV.

portant question frequently arises, What is the legal effect of an act performed in a corporate capacity without legislative permission? Shall the act be treated as absolutely void in legal contemplation? and, if not void, how far shall it be upheld? This question has been much agitated in the courts for nearly half a century, and the decisions upon it are far from being in harmony; but the highest authorities in this country seem now to have arrived at a philosophical and reasonable solution of the difficulty.

An assumption of the privilege of acting in a corporate capacity does not involve an infringement of the rights of other persons. It neither interferes with their property, their personal liberty, nor their security. Hence, there is no reason of immediate justice to others why a number of individuals should not be permitted to form a corporation of their own free will, and without first obtaining permission from the legislature, just as they may form a partnership, or enter into ordinary contracts with each other.

The only argument against leaving the exercise of corporate power entirely unrestricted by law is the argument of public policy. It may be said that the non-responsibility of the individual shareholders for corporate acts and liabilities would be productive of fraud and imposition; for persons dealing with a self-constituted corporation would have no means of knowing its capital and its constitution, and yet could not have recourse against the individual members, as in case of a co-partnership. The objection here stated might, however, be remedied by requiring due notice of the corporate organization to be given to the world. And this seems to be the chief office of the general incorporation laws which are now in force nearly everywhere. To a great extent they repeal the prohibition of the common law, and leave the right of forming a corporation and of acting in a corporate capacity free to all, subject merely to such limitations and safeguards as are required for the protection of the public.

§ 653. Inasmuch as the prohibition of the common law against the unauthorized exercise of corporate power is based upon grounds of public policy alone, it seems but reasonable

that the effect of this prohibition upon the legal validity of corporate acts should be determined by the requirements of public policy.

Public policy clearly demands that a corporation be made responsible for the torts of its agents, to the same extent that an individual is made liable under similar circumstances, and it has been held accordingly, by almost universal consent.¹ It seems equally clear, that a corporation should never be coerced to do an unauthorized act. Hence, a corporation cannot be compelled, by a decree of specific performance, to carry out a contract, the performance of which would involve an unauthorized exercise of corporate power.² And for the same reason, a contract of this description will be treated as voidable by either party, while yet wholly unperformed.³

But, after a contract made by a corporation in excess of its chartered powers has been wholly performed by either party, another question arises. To hold the contract absolutely void in such case would often be productive of great injustice. If a business corporation should purchase property for a purpose unauthorized by its charter, it would be at least questionable whether public policy really required that the company should be at liberty to refuse paying for what it had obtained. Urgent considerations of equity to those immediately concerned may countervail the distant demands of a general public policy.⁴ Again, it would clearly be inequitable to allow innocent parties without notice to be prejudiced by an unlawful exercise of corporate power. It has therefore been held universally, that a conveyance of property or contract made by a corporation, in excess of its charter powers, will nevertheless be valid and binding as against a party who dealt with the company in good faith, and without notice of the illegality of the transaction.⁵

The penalty of dissolution may always be imposed upon an offending corporation by a proceeding of *quo warranto* or *scire facias*. But it has been stated by high authority, that "the

¹ *Infra*, § 725 *et seq.*

² *Infra*, § 681 *et seq.*

³ *Infra*, § 685.

⁴ *Infra*, § 689 *et seq.*

⁵ *Infra*, § 686 *et seq.*

doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong."¹

§ 654. **Statutory and Common Law Prohibitions applicable to Corporations and Individuals alike.** — In the preceding sections the legal effect of a simple absence of authority to act in a corporate capacity has been considered. A different question arises where an act or contract of a corporation is in violation of a statutory enactment, or is forbidden by the common law, without regard to the fact that it involves an unauthorized exercise of corporate power. In this case it is necessary to consider the legal effect of this statutory or common law prohibition, as well as the effect of a want of authority to act in a corporate capacity.

It requires no argument to show that, by incorporating an association, the legislature does not intend to emancipate it from the general laws of the land. An act of incorporation is merely a grant of the privilege of forming a corporation, and of acting in a corporate capacity. The persons upon whom this privilege is conferred remain subject to the general laws, whether they be acting singly or jointly, or in a corporate capacity.

Accordingly, it is well settled that the rules of law governing property and contract rights apply to corporations as well as to individuals. A corporation is bound by the usury laws and the Statute of Frauds; and the validity of its contracts depends upon the same principles of the common law which govern the contracts of an individual. So, it is clear that persons acting in a corporate capacity have no more right to appropriate property belonging to others, or to assume the right of condemning land under the power of eminent domain, unless expressly authorized to do so, than persons not acting in a corporate capacity.

Contracts made in violation of an express prohibition of the charter of a corporation must often be treated as void in legal contemplation, for a charter is a legislative enactment.²

¹ *Railway Co. v. McCarthy*, 96 U. S. 287, *per* Justice Swayne. ² *Infra*, § 657 *et seq.*

But it is always necessary to ascertain the intention of the legislature in order to determine the legal effect of a provision in a charter or in any other law. Thus, where a provision in the charter of a corporation is intended for the benefit of the shareholders, a contract made in violation of the provision will not be invalid, if the shareholders themselves have waived the objection. It has also been decided, that contracts made by a corporation without complying with mere formalities prescribed by its charter should not be treated as void, unless this appear clearly to have been intended by the legislature.¹

However, every act or contract of a corporation contravening an express provision of its charter, or a general rule of law, necessarily involves an unauthorized exercise of corporate power; and in determining the validity of such act or contract, the effect of the general prohibition against unauthorized corporate acts must be considered.

Rules and Authorities.

A.

§ 655. **The Effect of Common Law and Statutory Rules.**—The principles of the common law and the general body of the statute law apply to incorporated associations, except so far as they have been expressly exempted by the legislature. It follows, therefore, that a contract or transfer of property made by a corporation, in violation of a general statute or a principle of the common law, must be held invalid, unless otherwise enacted, if a contract or transfer of property made by an individual would be held invalid under similar circumstances. So the principles of the law relating to torts apply to corporations as well as to unincorporated individuals.²

It is not within the scope of this treatise to consider the effect upon corporate acts of those general principles of the common law and statutory enactments which apply to individuals and corporations alike. To do this fully would involve a consideration of the entire body of the law. Only a

¹ *Infra*, §§ 666, 672 *et seq.*

² *Supra*, § 725 *et seq.*

few of those cases will be referred to which are peculiarly applicable to corporations.

§ 656. **Contracts in Violation of Public Policy.** — Contracts which involve the doing of an immoral act are prohibited by the common law, and cannot be made the basis of a cause of action. The same is true of contracts which for any reason are deemed contrary to "public policy"; such contracts cannot as a rule be enforced through the courts.¹ This doctrine applies to corporations as well as to individuals.

Certain companies, like railroad corporations, have duties to the public to perform, and any act on their part tending to incapacitate them for the performance of these duties, is forbidden, upon grounds of public policy, and therefore illegal. For this reason, it has been held that a sale or lease by a railroad company of all of its property is void. It is a violation of a positive duty which the company owes to the State.² So, a contract not to operate a railroad required for the public use is illegal, and cannot be enforced.³ The same rule applies to a contract by a railroad company to give a preference to particular shippers in violation of the duties which the company owes to the public generally.⁴

§ 657. **Contracts prohibited by Statute.** — A contract expressly prohibited by statute cannot, as a rule, be enforced. However, the intention of the legislature is controlling, and a contract will not be treated as void on account of a provision in a statute, unless this be necessary in order to give effect to the law according to its meaning.⁵

The same rule applies where a contract is in violation of a provision contained in the charter of a corporation. A charter is a legislative enactment; and if the legislature intends that a contract prohibited by the charter of a corporation

¹ See, for example, *Marshall v. Baltimore, &c. R. R. Co.*, 16 How. 314; *Cook v. Sherman*, 20 Fed. Rep. 167.

² *Thomas v. Railroad Co.*, 101 U. S. 71; and see *infra*, § 1120.

³ *Infra*, § 1115. *State v. Hartford, &c. R. R. Co.*, 29 Conn. 588.

⁴ *Infra*, § 1118 *et seq.* *Messenger v. Pennsylvania R. R. Co.*, 86 N. J. L. 418.

⁵ See *Harris v. Runnels*, 12 How. 79; *Pangborn v. Westlake*, 86 Iowa, 546.

shall be legally null and void; the courts must so hold.¹ The intention of the legislature must be ascertained and given effect in each case; and a contract prohibited by the charter of a corporation should be held void on the ground of illegality only if that construction is necessary to give effect to the intention of the legislature.²

§ 658. **The Effect of general Statutory Prohibitions against the unauthorized Exercise of Corporate Powers.**—Statutes have frequently been passed, expressly prohibiting corporations from exercising any powers except those conferred by their charters. Sometimes these prohibitions are enacted in the form of general laws applicable to all corporations, and sometimes they are incorporated in special charters applicable to particular corporations only.

Prohibitions of this description are merely declaratory of the general common law prohibition against any exercise of corporate powers which has not been authorized by the legislature; and there is no reason for supposing that the legislature, in enacting such a prohibition, intends to give it any greater force or effect than the common law rule.

There are very strong reasons why such a prohibition should not be construed as rendering absolutely null and unenforceable corporate acts and contracts which are in excess of the company's chartered powers. A statutory prohibition against every unauthorized exercise of corporate power would apply with equal force to every act and contract made by a corporation without proper authority; and if it were construed to render any particular act or contract absolutely

¹ See *Bank of U. S. v. Owens*, 18 Conn. 249; *Rutland*, 2 Pet. 527; *Hitchcock v. Galveston*, &c. R. R. Co. v. *Proctor*, 29 Vt. 98, 96 U. S. 351; *Hitchcock v. U. S.* 96; *Crocker v. Whitney*, 71 N. Y. Bank, 7 Ala. 386, 434; *Ohio Life* 161, 170; *Martin v. Zellerbach*, 88 Cal. 300, 309; *Whitney v. Peay*, 24 Ark. 22; *Taylor v. Chichester*, &c. Ry. Co., L. R. 2 Exch. 379, *per Blackburn, J.*; *In re Cork*, &c. Ry. Co., L. R. 4 Ch. 748, 759; and see cases in the following sections.

² See cases cited in the following sections.

59 Wis. 655; *Philadelphia Loan Co.*

void, in legal contemplation, the same rule would be applicable in every case. Such a result would be productive of great injustice, as well as inconvenience. The slightest informality would become fatal to the validity of a corporate transaction, and it would be almost impossible to deal with a corporation with any degree of safety.

§ 659. There is probably no State or country in which a rule contrary to the views above expressed has been systematically enforced. In many instances these legislative prohibitions declaratory of the common law have been tacitly ignored by the courts. Thus, the Revised Statutes of New York declare that, "In addition to the powers enumerated . . . and to those expressly given in its charter, or in the act under which it shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given";¹ but it has never been held that corporate acts and contracts in violation of this prohibition are necessarily null and unenforceable at law. There are numerous cases in which prohibited acts and contracts falling within the prohibition have been recognized and given effect.²

§ 660. In some instances, however, contrary views have been expressed by the judges. Thus, in a case before the Supreme Court of New Jersey, it was held that a contract in violation of a statute almost identical in terms with the statute of New York must necessarily be held legally null and unenforceable. Bedle, J., said: "It is sufficient that the terms of this enactment are plain, and its meaning cannot be misunderstood, and that, when a corporation exercises powers outside of those permitted by that section, its action is obnoxious to the charge that there is not only a want of authority, but that it is against an express enactment. . . . The legislature has a policy in this matter. It is clearly defined; and that third section must be taken as a prohibition of any acts not within the scope of the powers permitted.

¹ 1 R. S. 600, § 3.

68 N. Y. 62; *Whitney v. Wyman*,

² See *Moss v. Averell*, 10 N. Y. 101 U. S. 392, 396.

400; *Whitney Arms Co. v. Barlow*,

Contracts in contravention of it are against the declared policy of the State, and must be held to be illegal and of no binding obligation."¹

In *Ashbury Railway Carriage Company v. Riche*,² the House of Lords decided that a statutory provision, that "but save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association," rendered a contract made by the company, outside of its original purposes, absolutely null and void. The Lord Chancellor, Lord Cairns, said: "In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears that it was the intention of the legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, according to the words of Mr. Justice Blackburn, every court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified."³

These views have never been carried to their logical consequences by the courts, either in New Jersey or in England, and it is difficult to reconcile them with the actual decisions rendered by the same courts in other cases.⁴ Probably,

¹ *Morris, &c. R. R. Co. v. Sussex R. R. Co.*, 20 N. J. Eq. 542, 562, 564.

² *Ashbury Ry., &c. Co. v. Riche*, L. R. 7 H. L. Cas. 658.

³ *Ibid.* 673. Compare the judgments of the dissenting judges in the Court of Exchequer and the Exchequer Chamber. See also *Taylor v. Chichester, &c. Ry. Co.*, L. R. 2 Exch. 856; L. R. 4 H. L. 628.

⁴ It has been held in England, that the acts of Parliament incorporating companies must be construed

as impliedly prohibiting them from doing any acts in excess of the purposes for which they are formed. Acts and contracts in violation of this implied prohibition have frequently been given effect by the courts. See *infra*, § 706, and compare *supra*, § 817.

In *Payne v. Mayor of Brecon*, 27 L. J. Exch. 495, a covenant in a mortgage made by a municipal corporation in violation of an act of Parliament was enforced. Bramwell, B., said: "In the present case, I think 'it shall not be lawful'

therefore, these views would not be deemed controlling in any case in which the result would evidently be unjust or inconvenient.

And it may be assumed that the courts would in no case declare a transaction void, on account of a general prohibition of this description, as against a person who acted in good faith and without notice of the infringement of the law.¹

§ 661. *Statutes regulating Foreign Corporations.* — In many of the States foreign corporations are prohibited by statute from carrying on business until certain prescribed conditions have been complied with. The construction of these statutes by the courts has often been narrow and arbitrary, showing little appreciation of the ultimate consequences or of the probable intentions of the legislature.

In Oregon, it was enacted that "A foreign corporation, before transacting business in the State, must duly execute and acknowledge a power of attorney, and cause the same to be recorded in the county clerk's office of each county where it has a resident agent."² It was decided that all contracts made by a foreign corporation in the State before it had executed and recorded the prescribed power of attorney were rendered void and unenforceable by the statute.³ In *Sample v. Bank of British Columbia*⁴ this doctrine was

means that the corporation may not do such and such a thing, and that, as regards third parties, if they choose to do it, the contract is not unlawful."

¹ See *infra*, § 686 *et seq.*

² Act of Oct. 21, 1864, sect. 8.

³ *Re Comstock*, 3 Sawy. 218; *Bank of British Columbia v. Page*, 6 Oreg. 431; *Oregon, &c. Investment Co. v. Rathbun*, 10 Chic. L. N. 58; 5 Sawy. 32.

Under a similar statute in Dakota, it was held that a foreign corporation suing within the State was not obliged to allege in its complaint that it had complied with the statu-

tory requirements. *American Button Hole, &c. Co. v. Moore*, 2 Dak. 280.

⁴ *Sample v. Bank of British Columbia*, 5 Sawy. 88.

In Pennsylvania, it was held that the sureties of an agent appointed by a foreign insurance company, which has not complied with the provisions of the law regulating such companies, were not liable. *Mutual Benefit Life Ins. Co. v. Bales*, 92 Pa. St. 354; *Thorne v. Travellers' Ins. Co.*, 80 Pa. St. 15. Compare *U. S. Life Ins. Co. v. Adams*, 7 Biss. 80; *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534.

carried even further. The plaintiff had mortgaged certain property to the defendant, a foreign corporation, for money borrowed. Upon non-payment of the loan the mortgage had been foreclosed, and defendant had purchased the property at the foreclosure sale. After the sale had been confirmed the mortgagor brought suit to recover the property, on the ground that the corporation had obtained no title by the purchase, because it was a foreign corporation and had not complied with the statute above quoted. The court held that the purchase was void, and that the plaintiff was entitled to recover.

§ 662. In Illinois it was enacted "that it shall not be lawful for any agent or agents of any insurance company, incorporated by any other State than the State of Illinois, directly or indirectly to take risks or transact any business of insurance in this State without first producing a certificate of authority from the Auditor of State," &c.¹ The statute also imposed a penalty for a violation of its provisions. The Supreme Court held that a promissory note given to an insurance company which had not complied with the statute was void, and could not be enforced. The reasoning by which this conclusion was reached was expressed by Mr. Justice Walker as follows: "When the legislature prohibits an act, or declares that it shall not be lawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person, or corporation, or individual, the same rights in enforcing prohibited contracts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate the law, certainly withdraws a large portion of the fear that deters men from defying the law. To do so places the person who violates the law on an equal footing with those who strictly observe its requirements.

¹ Laws of 1855, p. 46; State's Comp., sect. 1, p. 596.

That this contract is absolutely void as to appellee we entertain no doubt."¹

The same rule was applied in Wisconsin under a similar statute.² But it was also held that the prohibition merely rendered it unlawful for foreign insurance companies *to transact business* within the State, until the statute had been complied with; that it would not prevent such companies from taking securities from residents within the State for debts lawfully contracted, or from suing in the courts of the State to enforce the securities so taken.³

A similar position has been taken by other courts; and it has been held that a law prohibiting foreign corporations from "doing business," does not abridge their right to sue for the recovery of their property, and the enforcement of their rights within the State.⁴ The doing of isolated acts of business within a State is not "doing business" within such a prohibition.⁵

§ 663. In Indiana, an act of the legislature, applicable generally to foreign corporations, provides that "Such foreign corporations shall not enforce in any courts of this State any contracts made by their agents, or by persons assuming to act as their agents, before a compliance by such agents, or persons acting as such, with the provisions of sections 1 and 2 of this act."⁶ It was decided that, while contracts made by a foreign corporation, which had not complied with the statute were valid, the corporation could not sue on such contracts until after the statutory requirements were fulfilled,

¹ *Cincinnati, &c. Ass. Co. v. Rosenthal*, 55 Ill. 85, 91.

² *Ætna Ins. Co. v. Harvey*, 11 Wis. 394. See also *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526, 533.

³ *Charter Oak Life Ins. Co. v. Sawyer*, 44 Wis. 387. The opinion of Ryan, C. J., in this case is emphatic.

⁴ *Utley v. Clark-Gardner, &c. Mining Co.*, 4 Col. 369. Compare *Smith v. Little*, 67 Ind. 549; *Beard*

v. Union, &c. Publishing Co., 71 Ala. 60.

⁵ *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727. Compare *Morgan v. White*, 101 Ind. 413. See *supra*, § 321.

As to what is a sufficient designation of an agent to receive process under a statute of this character, see *Goodwin v. Colorado, &c. Investment Co.*, 110 U. S. 1.

⁶ Act approved June 17, 1852.

and that the objection to the company's right to sue must be pleaded in abatement.¹

This act was superseded, as to insurance companies incorporated under the laws of other States, by the act of 1865, which prohibited such companies and their agents from doing business within the State until certain conditions had been complied with, and a certificate obtained from the Auditor of the State.² It was decided by the Supreme Court that this statute did not merely affect the right of foreign insurance companies to sue in the courts of the State, but that contracts made by such companies before complying with the prescribed conditions were absolutely void by force of the statute.³

§ 664. In Massachusetts, the statute requiring foreign insurance companies doing business in the State to appoint agents upon whom process against the company may be served, prescribes expressly the consequences resulting from a non-compliance with the statutory requirements. It provides that a contract of insurance made by a company which has failed to comply with the statute shall be valid, but that the agent making the same shall be liable to certain penalties, and the company shall not recover any premium due or assessment made by it on such policy until the statute has been complied with.⁴

¹ *Walter A. Wood Mowing, &c. Co. v. Caldwell*, 54 Ind. 270; *Smith v. Little*, 67 Ind. 549; *Daly v. National Life Ins. Co.*, 64 Ind. 1, 8, 9; *Singer Manuf. Co. v. Brown*, 64 Ind. 548; *Domestic Sewing Machine Co. v. Hatfield*, 58 Ind. 187; *Singer Manuf. Co. v. Effinger*, 79 Ind. 264; *Elston v. Piggott*, 94 Ind. 14.

Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520, must be deemed overruled so far as it is inconsistent with the above doctrine. Compare *Barney v. Daniels*, 32 Ind. 19; *Payson v. Withers*, 5 Biss. 269; *New England Fire, &c. Ins. Co. v. Robinson*, 25 Ind. 536; *American Ins. Co. v. Butler*, 70 Ind. 1; *Lamb v.*

Lamb, 13 Nat. B. Reg. 17. See *New Hope, &c. Bridge Co. v. Poughkeepsie Silk Co.*, 25 Wend. 648.

² Act of Dec. 21, 1865.

³ *Hoffman v. Banks*, 41 Ind. 1; *Union Cent. Life Ins. Co. v. Thomas*, 46 Ind. 44; *Farmers', &c. Ins. Co. v. Harrah*, 47 Ind. 236; and see *Walter A. Wood Mowing, &c. Co. v. Caldwell*, 54 Ind. 273. Compare, however, *American Ins. Co. v. Wellman*, 69 Ind. 413; *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347.

⁴ See *National Mut. Fire Ins. Co. v. Pursell*, 10 Allen, 232; *Roche v. Ladd*, 1 Allen, 441; *Williams v. Cheney*, 3 Gray, 215, 222; *Jones v. Smith*, 3 Gray, 500.

§ 665. **The proper Construction of Statutes regulating Foreign Corporations.** — The object of the various statutes providing that foreign corporations, before transacting business, shall comply with specified conditions, such as filing copies of their charters, making statements of their financial condition, appointing agents upon whom process can be served, &c., is to protect parties dealing with these companies from imposition, and to secure convenient means of obtaining jurisdiction in the local courts. These statutes place foreign corporations in the same position as domestic corporations, in the particulars provided for. It is clearly not the primary purpose of the legislature, in passing these statutes, to render the contracts and dealings of corporations which have not complied with the statutes void and unenforceable. Hence, where the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result, unless this be necessary in order to attain the primary object for which the statute was passed.

For these or similar reasons, some of the courts have held that a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business will not, on that account, be held absolutely void, unless the statute declares that it shall be void; and if the statute imposes a penalty upon the corporation or its agents for failing to comply with the prescribed formalities, these penalties will be deemed exclusive of any others.¹

It has been held that, even if a contract made by a foreign corporation be treated as void in the State where the contract was made, by reason of the failure of the corporation to comply with the statutes of that State, it does not follow necessarily that it must be treated as void, on that account, in the courts of other States.² This view may be supported on the

¹ *Ehrman v. Teutonia Ins. Co., Ins. Co. v. Overholt*, 4 Dill. 288; 1 *McCrary*, 123; *Columbus Ins. Co. Union Mut. Life Ins. Co. v. McMullen*, 24 Ohio St. 67. See *King v. Middleton*, 19 Mo. 53; *Brooklyn National M. & E. Co.*, 4 Mont. 1. *Life Ins. Co. v. Bledsoe*, 52 Ala. 538, 551; *Northwestern, &c. Life* ² *Eureka Ins. Co. v. Parks*, 1 Cin. Super. Ct. 574.

ground that a statute of this kind is intended merely to enforce a local policy; that the inability to enforce contracts created before the statute has been complied with is imposed merely as a penalty; and that therefore courts of other States would not be obliged by comity to give effect to such statutes.

§ 666. *The Legal Effect of special Prohibitions.* — The intention of the legislature must always be sought after, in deciding upon the legal effect of words contained in a law or charter; and, unless it appear affirmatively that the legislature intended to render a forbidden act or contract absolutely void in legal contemplation, it will not be so held.¹ However, the transaction in such case remains open to the two objections, that it is outside of the authority delegated to the majority or any other agency of the corporation, and that it involves an unauthorized exercise of corporate powers. Either one of these objections may, under certain circumstances, be fatal to the validity of the transaction.

For this reason, it is impossible, in many of the cases in which a contract of a corporation was held to be invalid because in violation of the charter, to distinguish the exact ground upon which the decision rests; for the contract may have been held invalid for either of the two reasons above mentioned, as well as upon the ground that it was declared void by the legislature. But in every case where a contract of a corporation was allowed to stand, although in contravention of the charter, it must be assumed that the court reached the conclusion that the legislature did not intend the prohibited contracts to be absolutely null and void in legal contemplation. It is plain that a contract which is made void by statute cannot be made valid by the agreement of the parties to the contract.²

§ 667. *Illustrations. — Usury Laws.* — Corporations are subject to the general usury laws unless expressly exempted from their operation; and the effect of such laws upon the validity of contracts executed by corporations in violation of their terms is the same as upon the validity of contracts of individuals.³

¹ *National Bank v. Matthews*, 98 U. S. 627.

² See *supra*, § 619.

³ *Perkins v. Watson*, 2 Baxt.

The courts of the various States have differed widely in construing usury laws similar in terms. In some instances such laws have been held to work a forfeiture of the illegal interest reserved or agreed upon; in other instances they have been held to cause a forfeiture of both the interest and the debt. There is no reason why a usury law applicable specially to corporations should be construed differently from a similar law applicable to individuals enacted in the same State. The effect upon a contract in violation of the statutory prohibitions should be the same in both cases. It has been held, in accordance with this view, that, if a corporation is prohibited by its charter or act of incorporation from charging interest in excess of a certain rate, contracts in violation of this prohibition should be treated as void and unenforceable, and as causing a forfeiture of the debt if such effect is attributed to similar prohibitions enacted by the legislature in the form of general usury laws.¹ But if the usury laws governing individuals do not render their contracts absolutely void, such effect will not be attributed to a law similar in terms applicable only to a particular corporation or class of corporations.²

§ 668. A different rule was established in an early case in Ohio, and has been repeatedly followed in that State. It was held that a provision in the charter of a corporation, that "the said corporation shall not take more than at the rate of six

(Tenn.) 173, 183; *Farmers', &c. Commercial Bank v. Nolan*, 8 Miss. Bank v. Harrison, 57 Mo. 503; *Sullivan v. Portland, &c. R. R. Co.*, 4 Miss. 75; *Grand Gulf Bank v. Archer*, 16 Miss. 151; *Farmers', &c. Bank v. Harrison*, 57 Mo. 503; *Perkins v. Watson*, 2 Baxt. (Tenn.) 173, 183; *McLean v. Lafayette Bank*, 8 McLean, 587. See also *Tiffany v. Boatman's Institution*, 18 Wall. 375.

¹ *Bank of U. S. v. Owens*, 2 Pet. 527, 538; *Orr v. Lacey*, 2 Dougl. (Mich.) 230; *Hitchcock v. United States Bank*, 7 Ala. 386, 434. See also *Tiffany v. Boatman's Institution*, 18 Wall. 375.

² *Philadelphia Loan Co. v. Towner*, 18 Conn. 249; *Lebanon Nat. Bank v. Karmany*, 98 Pa. St. 65; *Larwell v. Hanover Savings, &c. Soc.*, 40 Ohio St. 274, 280; *Commercial Bank v. Nolan*, 8 Miss. 508; *Planters' Bank v. Sharp*, 12 Miss. 75; *Grand Gulf Bank v. Archer*, 16 Miss. 151; *Farmers', &c. Bank v. Harrison*, 57 Mo. 503; *Perkins v. Watson*, 2 Baxt. (Tenn.) 173, 183; *McLean v. Lafayette Bank*, 8 McLean, 587. See also *Fleckner v. Bank of United States*, 8 Wheat. 338; *National Bank v. Matthews*, 98 U. S. 627; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250; *Rock River Bank v. Sherwood*, 10 Wis. 230; *Farmers' Bank v. Hale*, 59 N. Y. 53.

per centum per annum on its loans and discounts," rendered a loan violating this provision wholly void and unenforceable, although a different rule of construction was applied to a similar prohibition governing unincorporated individuals.¹ The court held that this result must follow, by reason of a want of *power* in the corporation to make the prohibited contracts, — a view which was clearly the result of a confusion of ideas.² It is evident from a recent decision of the Supreme Court of Ohio, that a different conclusion would be reached by that court at the present day, if the question were an open one.³

A provision in a charter or general law, restraining a corporation from *paying* interest in excess of a certain rate, would probably in no case be held to render a contract for interest in excess of the rate authorized wholly void and illegal; for the object of a provision of this nature would evidently be the government of the corporation and the protection of its shareholders, not the protection of the public, as in case of usury laws.⁴

§ 669. **Usury Law applicable to National Banks.** — National banks are authorized by acts of Congress to charge interest at the rates allowed by the laws of the States in which they are located, and no more.⁵ The national banking law also provides that the taking, receiving, reserving, or charging interest at a rate greater than that allowed shall operate as a forfeiture of the entire interest on the debt, and in case the excessive interest has been paid twice the amount thus paid may be recovered.⁶

¹ *Bank of Chillicothe v. Swayne*, 8 Ohio, 257; *Miami Exporting Co. v. Clark*, 18 Ohio, 1; *Kilbreth v. Bates*, 38 Ohio St. 187, 196, and cases there cited. Compare *Larwell v. Hanover Savings, &c. Soc.*, 40 Ohio St. 274; *National Bank v. Insurance Co.*, 41 Ohio St. 1.

² See *supra*, § 649. *Perkins v. Watson*, 2 Baxt. (Tenn.) 178, 183; *McLean v. Lafayette Bank*, 3 McLean, 587.

³ *National Bank v. Insurance Co.*, 41 Ohio St. 1.

⁴ Compare *infra*, § 672. *Larwell v. Hanover Savings, &c. Soc.*, 40 Ohio St. 274.

⁵ 13 Stat. at Large, 9, § 80; U. S. R. S. § 5197.

⁶ U. S. R. S. § 5198.

Only twice the excess over the legal rate can be recovered after the interest has been paid. *Hintermister v. First Nat. Bank*, 64

The penalties thus expressly imposed by the National Banking Act are the only penalties which apply where a national bank stipulates for interest at a usurious rate. National banks are in no degree bound by the usury laws of the different States. The rates of interest fixed by these laws apply to national banks merely because the National Banking Act so provides. If a national bank charges interest in excess of the rate allowed, this constitutes a violation of the National Banking Act, but not of the State law, and the consequences must be determined by the National Banking Act alone. This act does not say that the effect shall be the same as under the State laws, but provides a peculiar penalty, applicable in all cases. Hence, if a national bank in New York should contract for usurious interest on a loan, only the interest would become forfeited, though a violation of the usury law of New York would result in a forfeiture of the debt as well as the interest.¹

§ 670. **Laws against unauthorized Banking.** — The general laws of New York restraining unauthorized banking prohibit incorporated companies from discounting bills and notes, unless expressly incorporated for banking purposes, and it is provided that all securities given in violation of this act shall be void. The effect of these provisions is to render absolutely void any bill or note discounted, or security given, in violation of the act,² but not to cause a forfeiture of the debt. The

N. Y. 212; *Brown v. Second Nat. Bank*, 72 Pa. St. 209.

¹ *Farmers', &c. Nat. Bank v. Dearing*, 91 U. S. 29; *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492, 502; *Cheek v. Merchants' Nat. Bank*, 10 Heisk. 618; *Lazear v. Nat. Union Bank*, 52 Md. 78; *Citizens' Nat. Bank v. Leming*, 8 Int. Rev. Rec. 182; *Wiley v. Starbuck*, 44 Ind. 298; *Brown v. Second Nat. Bank*, 72 Pa. St. 209; *Davis v. Randall*, 115 Mass. 547; *Central Nat. Bank v. Pratt*, Id. 539.

The decisions of the Court of Appeals of New York in *First Nat.*

Bank v. Lamb, 50 N. Y. 95, and *Farmers' Bank v. Hale*, 59 N. Y. 53, are overruled. *Hintermister v. First Nat. Bank*, 64 N. Y. 212.

² *New York Trust, &c. Co. v. Helmer*, 12 Hun, 85; 77 N. Y. 64. See *Bank of Chillicothe v. Dodge*, 8 Barb. 233. See also *New York, &c. Ins. Co. v. Ely*, 5 Conn. 560, 573; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249.

With regard to the rule under the laws of Missouri, see *Long v. Long*, 79 Mo. 646; *Connecticut Mut. Life Ins. Co. v. Albert*, 39 Mo. 181; *Bank of Louisville v. Young*, 37 Mo. 398.

money paid on an illegal discount may be recovered, though the bill or note given as security be treated as void.¹

It has been held that a note or bill of exchange, issued in violation of a general law which enacts that no banking corporation shall issue or put in circulation any bill or note unless the same shall be payable on demand and without interest, must be treated as void on the ground of illegality.²

§ 671. *Laws relating to Devises to Corporations.* — The statute of New York prohibiting devises of real estate to corporations, unless expressly authorized by their charters or by statute to take by devise, renders prohibited devises absolutely void; and it has been held that the legislature cannot by subsequent enactment validate a devise which is void under the statute, for this would impair the vested rights of the heir.³

A distinction should be observed between the effect of laws restricting the power of testators to devise their property to corporations, and laws restricting the power of corporations to take property. Such laws differ both in their application and in their legal effect.⁴

§ 672. *Regulations for the Protection of the Shareholders.* — In determining the legal effect of a legislative provision, it is always necessary to consider the object for which it was passed. If a prohibition contained in a charter of incorporation or general law appears to have been passed for the protection of the community at large against certain corporate

¹ See *Pratt v. Short*, 79 N. Y. 487, reversing 18 Hun, 293; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Utica Ins. Co. v. Cadwell*, 8 Wend. 296; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652. See *infra*, § 721.

² *Leavitt v. Palmer*, 3 N. Y. 19; 5 Barb. 9; *Tracy v. Talmage*, 14 N. Y. 162; *Talmage v. Pell*, 7 N. Y. 328; *Weed v. Snow*, 3 McLean, 265; *Hayden v. Davis*, 3 McLean, 276; *Root v. Wallace*, 4 McLean, 8; *Davis v. Bank of River Raisin*, 4 McLean, 387. See also *Marion Savings Bank v. Dunkin*, 54 Ala. 471; *Brown v. Killian*, 11 Ind. 449.

But the money advanced upon a bill or note issued in violation of the act may be recovered, on rejecting the illegal security. *Oneida Bank v. Ontario Bank*, 21 N. Y. 490. Compare *Faneuil Hall Bank v. Bank of Brighton*, 16 Gray, 584; *Mills v. Western Bank*, 10 Cush. 22; *Western Bank v. Mills*, 7 Cush. 589.

³ *White v. Howard*, 46 N. Y. 144. *Supra*, § 833.

⁴ See *supra*, §§ 331-333.

acts, such effect must be attributed to the prohibition as will effectually protect the community against these acts. The object of the prohibition being the protection of the public, it is evident that its application would not be affected by the consent or non-consent of the shareholders of the company.

On the other hand, if the prohibition appears to be designed merely to regulate the corporate affairs for the benefit of the shareholders, it should be construed with that end in view. A prohibition of this description should be regarded merely as part of the contract of association between the shareholders of the corporation, limiting the powers of its agents and of the majority, but not as an imperative enactment of the legislature, rendering all transactions within the prohibition invalid, on the ground of illegality.

§ 673. *Dealings in Prohibited Securities. — National Banks.* — The National Banking Act provides that the total liabilities of a bank formed under the act "shall at no time exceed one tenth part of the amount of the capital stock of such association actually paid in." It has been decided by the Supreme Court of the United States, that a loan made in violation of this provision is not wholly void; and that a person having borrowed an amount exceeding one tenth of the capital paid in cannot set up the illegality of the transaction as a defence to a suit brought by the bank for the money borrowed.¹

So a loan, made by a corporation upon a security forbidden by its charter, has been held to be enforceable against the borrower.² It is well settled that a conveyance of real

¹ *Gold Mining Co. v. National Bank*, 96 U. S. 640; *National Bank v. Case*, 99 U. S. 688. See also *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 1 Col. 581; *O'Hare v. Second Nat. Bank*, 77 Pa. St. 96; *Bly v. Second Nat. Bank*, 79 Pa. St. 453; *Allen v. First Nat. Bank*, 28 Ohio St. 97; *Stewart v. National Union Bank*, 2 Abb. (U. S.) 424; *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; *Elder*

v. First Nat. Bank, 12 Kans. 288. Compare *Germantown, &c. Ins. Co. v. Dhein*, 48 Wis. 420; *Penn v. Bornman*, (Sup. Ct. Ill., June, 1881,) 13 Chic. L. N. 383.

² *Mott v. U. S. Trust Co.*, 19 Barb. 568; *Davis Sewing Machine Co. v. Best*, 30 Hun, 638; *Little v. O'Brien*, 9 Mass. 428; *Mutual Life Ins. Co. v. Wilcox*, 8 Biss. 203. As to loans by national banks upon the security of shares in them-

estate taken by a national bank as security for a contemporaneous loan, or for future advances, is not void, although prohibited by the act. The bank would be entitled to enforce the security, although illegal, and although its franchises might be revoked by the government by reason of the violation of the law.¹

In *Ayers v. South Australian Banking Company*,² it was decided that a clause in the charter of a bank, providing that it should not be lawful for the bank to make advances on merchandise, would not invalidate a transfer of property made to the corporation in violation of this provision. Lord Justice Mellish, delivering the opinion of the Lords of the Privy Council, said: "Their Lordships are of opinion that, whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing, or of preventing an action of trover being maintained if there is a wrongful conversion."

In *Phosphate of Lime Company v. Green*,³ a purchase by a *limited* company of a number of its own shares was held binding, although the articles of the company expressly provided that it should not, under any circumstances, purchase its own shares.

§ 674. *Regulations for Management of Corporations.*—The same method of construction was applied by the Court of Appeals of Maryland in *Lester v. Howard Bank*.⁴ The charter of a corporation contained the provision that "this act is passed

selves, see U. S. R. S. § 5201; *National Bank v. Stewart*, 107 U. S. 559. 676. *Supra*, § 384.

¹ *National Bank v. Whitney*, 103 U. S. 99, reversing *Crocker v. Whitney*, 71 N. Y. 161; *National Bank v. Matthews*, 98 U. S. 621, reversing *Matthews v. Skinker*, 62 Mo. 329. See also *Thornton v. Nat. Exchange Bank*, 71 Mo. 221; *Graham v. National Bank*, 82 N. J. Eq. 804; *Winton v. Little*, 94 Pa. St. 64; *Oldham v. First Nat. Bank*, 85 N. C. 240.

² *Ayers v. South Australian*

Banking Co., L. R. 3 P. C. 548, 559.

³ *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43. Compare *Meyers v. Valley Nat. Bank*, 18 Bank. Reg. 84; *Franklin Bank v. Commercial Bank*, 86 Ohio St. 350.

⁴ *Lester v. Howard Bank*, 38 Md. 558. Compare the remarkable decision of the Supreme Court of Illinois in *Workingmen's Banking Co. v. Rautenberg*, 103 Ill. 460. See also *Barton v. Port Jackson, &c. Plank Road Co.*, 17 Barb. 397.

on the condition . . . that no director or other officer of said corporation shall borrow any money from said corporation, and if any director shall be convicted of directly or indirectly violating this section he shall be punished by fine and imprisonment." It was held that a loan made to a director in violation of this prohibition could be enforced by the corporation, as the statute was passed to protect the corporation from a misapplication of funds.

For similar reasons, it has been held that a provision in a law regulating savings banks, that the trustees of such banks should see to the proper and safe investment of the deposits and funds, but that "no loan shall be made on the security of names alone," was but a direction to the trustees, designed for the security of depositors; and that it would not prevent the enforcement of a promissory note purchased in violation of the provision.¹

§ 675. **Formalities prescribed by Law in the Corporate Transactions.** — Provisions in a charter or general incorporation law, requiring certain formalities to be observed in the corporate transactions, are not, as a rule, intended to have the force of imperative laws. Such provisions will be treated merely as directions imposed for the benefit of the shareholders, unless a contrary intention is indicated by the legislature. Thus, a provision in a law or charter requiring a vote of the stockholders of a corporation to be taken in a particular form, before the corporation shall be authorized to enter into certain engagements, would constitute a limitation upon the powers of the corporate agents and of the majority,² but would not render an informal engagement void on the ground of illegality. If the shareholders should unanimously acquiesce in a disregard of such a provision, placed in the charter for their benefit, the company cannot escape responsibility for the acts of its agents, upon the ground that they have failed to comply with the prescribed forms.³ A corporation,

¹ *Farmington Savings Bank v. Fall*, 71 Me. 49. Compare *National Pemberton Bank v. Porter*, 125 Mass. 333.

² *Supra*, § 582.

³ *Supra*, §§ 634, 635.

whose charter requires its contracts to be executed in a certain form, may by its acquiescence become liable upon contracts made by its agents in another form.¹ If the charter requires the assent of the shareholders, by resolution or otherwise, their acquiescence in a contract made without obtaining a resolution will cure the defect.²

The reasons which govern the courts in cases of this character were clearly set forth by the Supreme Court of Michigan in *Beecher v. Marquette and Pacific Rolling Mill Company*.³ The general law under which a manufacturing company was incorporated contained a provision that no alienation, diversion, sale, or mortgage of any part of the real estate of any company formed under the act should "have any force or effect, or pass any title thereto, or interest therein, unless expressly authorized by the vote of three fifths in interest of the entire stock of said company," at a meeting notified in a prescribed manner. The Supreme Court held, that a mortgage which had not been expressly authorized by a meeting of the stockholders called in the prescribed manner was valid, the stockholders having waived the irregularity. Cooley, J., said: "The statute under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action after they have been notified of a proposal to do so,

¹ This was held to be undoubted law in *Bulkley v. Derby Fishing Co.*, 2 Conn. 252 (see opinions of Hosmer and Gould, JJ., pp. 256, 257); *Kilgore v. Bulkley*, 14 Conn. 362; *Bates v. Bank of Alabama*, 2 Ala. 451, 462-465; *Bond v. Central Bank*, 2 Ga. 92; *Dana v. Bank of St. Paul*, 4 Minn. 385; *Bank of Northern Liberties v. Cresson*, 12 S. & R. 306; *Kenner v. Lexington Manuf. Co.*, 91 N. Car. 421; Compare *Head v. Providence Ins. Co.*, 2 Cranch, 127.

Under a statute providing that every contract of a corporation shall

be in writing, and contain certain formalities, "otherwise the same shall be void," it was held that the absence of a writing could not be set up as a defence to an action upon a contract, unless it was pleaded by the defendant. *Kenner v. Lexington Manuf. Co.*, 91 N. Car. 421.

² *Zabriskie v. Cleveland, &c. R. R. Co.*, 28 How. 381.

³ *Beecher v. Marquette, &c. Rolling Mill Co.*, 45 Mich. 103. See also *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 828, 338; *Rochester Savings Bank v. Averell*, 96 N. Y. 467.

and have had time to deliberate upon and fully consider it. But the matter does not concern the public at large; no principle of public policy is at stake; no wrong, direct or indirect, is done to any human being if a conveyance is made or mortgage given without the exact notice required, unless it be a wrong to the stockholders themselves. And as others are not concerned, why should the statute give them the right to raise questions of regularity which the stockholders elect to waive? We are satisfied such was not its purpose. . . . The corporators may possibly have had a right to take advantage of the exact words of the statute, repudiate their action, and treat the mortgage as of no force and effect, but they had an equal right to treat it as effective and valid. They have chosen the latter course, and this is conclusive upon the corporation, and upon any one claiming under it."

§ 676. *Provisions prescribing Qualifications of Officers and Formalities of Appointment.* — The same rule of construction governs where the charter of a corporation prescribes formalities to be observed in the management of its internal affairs. Thus, in *Bank of the United States v. Dandridge*,¹ it was held that where a person had been appointed cashier of a bank, and had in fact acted as cashier, the sureties upon his official bond were liable, although the bond had not been approved in the manner prescribed by the charter. So, if the directors of a bank fail to comply with a provision of its charter, requiring them to proceed at once to protest a dishonored note, and to enforce the security, this will not discharge the principal debtor; for that was not the object of the provision.²

In *Hazlehurst v. Savannah, &c. Railroad Company*,³ it was held that a provision in a charter fixing the number of shares to be issued by the corporation, and the qualifications of the

¹ *Bank of United States v. Dandridge*, 12 Wheat. 64, 81; *State Bank v. Chetwood*, 8 Hal. (N. J. L.) 1; *Baird v. Bank of Washington*, 11 S. & R. 411; *In re Mohawk, &c. R. R. Co.*, 19 Wend. 185. See *Hughes v. Parker*, 20 N. H. 58.

² *Moreland v. State Bank*, 1 Breese (Ill.), 263.

³ *Hazlehurst v. Savannah, &c. R. R. Co.*, 43 Ga. 13, 56, *per* Moreland, J. Compare *Pemigewasset Cay, J.* Compare *Bank v. Rogers*, 18 N. H. 255.

directors, was "a regulation looking to the internal management of the affairs of the company, to the rights of the stockholders among each other. . . . These things are, even if they be provided for in the charter, mere contracts among the stockholders for the regulation of their rights as to each other; they are contracts, too, which any one stockholder has a right to insist upon, even against every other. But if there be a dealing with third persons, in which the stockholders acquiesce, or which they confirm, they cannot plead, when called on to comply with their contract, that it was *ultra vires*."

§ 677. *Formalities in Subscriptions for Shares and in Transfers.* — A similar rule of construction has been applied to provisions in charters or general incorporation laws, directing certain formalities to be observed in subscriptions for shares,¹ or in executing transfers.² Such provisions are binding upon the shareholders as between each other, and limit the powers of the company agents, but they do not render informal subscriptions or transfers void on the ground of illegality alone.

However, the decisions on this point are not harmonious. In *Wood v. Coosa, &c. Railroad Company*,³ an action was brought upon a subscription to shares in a railroad company, whose charter provided that "no subscription shall be received and allowed, unless there shall be paid to the commissioners, at the time of the subscription, the sum of five dollars on each share subscribed." The Supreme Court of Georgia held that the action could not be maintained, because the required deposit had not been paid. Lyon, J., said: "Can a contract be enforced in a court of justice, which was made in violation of an act of Assembly? It is not the first time this question has been asked in this court, and it has received but one answer, — 'The contract cannot be enforced.' I consider the contract in this case as void *ab initio*."

¹ *Infra*, §§ 741-743. *Weber v. bank previous to any proposed Fickey*, 52 Md. 516. transfer of shares, was held to

² *Bargate v. Shortridge*, 5 H. L. have been dispensed with by uni-
Cas. 297. In *Walton's Case*, 26 versal practice.

L. J. Ch. 545, a seven days' no-³ *Wood v. Coosa, &c. R. R. Co.*,
tice, required by the charter of a 82 Ga. 278, 290.

The reasoning by which the learned judge reached this result is plainly inconclusive. No one has ever denied that a contract must be held void by the court, if the legislature has so enacted. The question is whether the legislature *has* so enacted; and in order to solve this question the intention of the legislature must be considered. It is certainly not true that the legislature always intends every contract made in violation of a statute to be null and void, and there are many instances in which the courts have enforced such contracts.

§ 678. Prohibitions so construed as not to impair the Security of Titles, or affect innocent Persons without Notice. — The courts will never presume that the legislature intends a prohibited conveyance of property or contract to be wholly null and void, if this would impair the security of titles, or if persons acting in good faith and without notice of the illegality would suffer thereby. Such a result will not be attributed to an act of the legislature, unless it appears clearly to have been contemplated by the legislature.

Thus, conveyances of real and personal property have been held to confer title upon the transferee, although made in direct violation of the charters and general laws governing corporations.¹ Very inconvenient consequences would follow from a contrary doctrine. If such transfers were held to confer no title upon the transferees, subsequent purchasers would likewise acquire no title, and the security of titles having passed through a corporation would be seriously affected. It is true, that, where a transfer of property is made by an agent, the validity of the transfer depends upon the authority of the agent, and if the agent has no authority no title passes. But this rule is subject to important qualifications, which prevent it from working injustice to innocent parties.² The effect of

¹ *Ayers v. South Australian Fairbanks*, 27 La. Ann. 450; *Elwell Banking Co., L. R. 3 P. C. 548*, *v. Dodge*, 33 Barb. 336; and see 559, *per Mellish, L. J.*; *Beecher v. Marquette, &c. Rolling Mill Co.*, 45 Mich. 103; *National Bank v. Matthews*, 98 U. S. 627; *Shewalter v. Firner*, 55 Mo. 233; *Edwards v.*

² *Infra*, § 708.

an arbitrary and unqualified legislative enactment could not be so limited by the courts.¹

It has been held, in accordance with this view, that a clause in a charter providing that the corporation may lawfully hold lands to a certain amount, and no more, does not affect the title of the company to land held in excess of the authorized amount.² So it has been held that conveyances to corporations, contrary to the mortmain acts of Pennsylvania, are not void; their validity can only be assailed by the State.³ But any acquisition of property by a corporation, in violation of its charter or the general law, involves an unauthorized exercise of corporate power, and may be a ground for dissolving the corporation.

§ 679. *Prohibited Issues of Shares and Securities.*—By the Constitution and Revised Statutes of Illinois, it was provided that “no railroad corporation shall issue any stock or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created; and all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall be void.”⁴ The Supreme Court of Illinois, in a carefully considered case, held that, notwithstanding this provision, a *bona fide* purchaser of securities of a railroad company was not bound to see to the application of the purchase price. The court said: “We are of opinion, that, when one, for

¹ In *Madison Avenue, &c. Church v. Baptist Church*, 73 N. Y. 82, 90, it was held that a conveyance by a religious corporation in violation of the restraining law was void. Earl, J., said: “It would nullify the restraining law if the conveyance of a religious corporation could be held valid because it had executed and delivered its deed, and received the consideration therefor.” But the transferee, having paid debts secured by mortgage upon the property, as well as other debts, was allowed to hold the property as security for these advances.

² *Church of Redemption v. Grace Church*, 68 N. Y. 570, 582; *Jones v. Habersham*, 107 U. S. 174, 188; *The Banks v. Poitiaux*, 3 Rand. 136; *Leazure v. Hillegas*, 7 S. & R. 318; *Goundie v. Northampton Water Co.*, 7 Barr, 233, 240; *West's Appeal*, 64 Pa. St. 186; *De Camp v. Dobbins*, 29 N. J. Eq. 36.

³ *Leasure v. Union Mutual Life Ins. Co.*, 91 Pa. St. 491; *Leasure v. Hillegas*, 7 S. & R. 318; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 218.

⁴ Constitution, Art. 11, sect. 13; R. S. 114, sect. 22.

a present consideration, in good faith purchases bonds or stocks in the regular course of business from a railroad company, and such consideration is accepted by the proper officer of the company, and nothing appears to show that it is to be used or applied to other than legitimate corporate purposes, such bonds or stocks, when thus issued, will be regarded as having been issued for money, labor, or property (as the case may be), 'actually received and applied' within the meaning of the constitutional provision in question. Any other construction would lead to consequences of the most serious character, which could not have been intended by the framers of the Constitution."¹

In Wisconsin, it was enacted that "no corporation shall issue any stock, or certificate of stock, except in consideration of money, or labor, or property, estimated at its true money value actually received by it, equal to seventy-five per cent of the par value thereof; and all stocks and bonds issued contrary to the provisions of this section . . . shall be void." The Supreme Court held that stock issued in violation of this provision was null and void.²

The meaning of the word "stock," as used in the statutes above quoted, is not entirely clear. It seems reasonable to assume that these statutes were not designed to prevent corporations from receiving stock subscriptions, or, in other words, from creating shares, subject to the liability of the holder to pay them up. The evident object was to prevent shares from being issued as paid up unless actually paid up, and to invalidate certificates for paid-up shares issued by a corporation without an actual contribution of the amount of the shares to the company's capital.

§ 680. **Prohibited Issues of Negotiable Securities.**— If a corporation is expressly or impliedly prohibited by its charter from issuing negotiable instruments under certain conditions

¹ *Peoria, &c. R. R. Co. v. Thompson*, 108 Ill. 187.

² *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655. With regard to the effect of a provision in a charter

that "no person shall hold more than twenty shares in any such corporation in his own right," see *Simpson v. Building, &c. Ass.*, 38 Ohio St. 349.

or for certain purposes, notes issued by the company in violation of the prohibition will not be treated as void on that ground alone, unless the legislature has expressly so declared.¹ Instruments issued in violation of the charter may be impeached in the hands of persons having notice, on the ground that the agents of the company had no authority to issue such instruments; but *bona fide* purchasers without notice will be protected.² Thus, it has been held that bonds issued and sold by a corporation in violation of a provision of its charter prohibiting it from selling them at less than a certain price, could be enforced against the company by an innocent purchaser.³

Upon the same principle, it follows that a provision in the charter of a corporation, prohibiting it from creating an indebtedness in excess of a certain amount, does not render debts incurred in excess of that amount null and void by force of the legislative act, unless this be the plain meaning of the provision.⁴ So, where a particular course of dealing is prohibited by a charter, the particular transactions which constitute the course of dealing will not, as a rule, be treated as wholly void by statute.⁵

B.

§ 681. **A Corporation cannot be compelled by Legal Process to do an Act unauthorized by its Charter.** — It has been pointed out that all acts of a corporation which are not authorized by its charter are prohibited by the common law. The performance of such acts is therefore illegal, even though it involve

¹ *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. 381; *Webb v. Com'rs of Herne Bay*, L. R. 5 Q. B. 642. See *Tracy v. Talmage*, 14 N. Y. 162; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490.

² *Supra*, § 597 *et seq.*

³ *Ellsworth v. St. Louis, &c. R. R. Co.*, 98 N. Y. 553; 33 Hun, 7.

⁴ *Ossipee, &c. Manuf. Co. v. Can-*

ney, 54 N. H. 295. See *Fontaine v. Carmarthen Ry. Co.*, L. R. 5 Eq. 316, and *In re Pooley Hall Colliery Co.*, 21 L. T. n. s. 690. *Supra*, § 600.

⁵ See *Steam Nav. Co. v. Weed*, 17 Barb. 333; *Sacket's Harbor Bank v. Lewis County Bank*, 11 Barb. 213; *Potter v. Bank of Ithaca*, 5 Hill, 490; *Graham v. Hendricks*, 22 La. Ann. 523.

no infringement of private rights. A corporation which exceeds its chartered powers may be deprived of its franchises by forfeiture at the suit of the State, and may be subjected to statutory penalties. It seems a self-evident proposition, that the courts, charged with the administration of the law, cannot by their decree compel a corporation to do an act which the law, for reasons of public policy, has forbidden.

Accordingly, it has been held that a court of equity cannot decree the specific performance of a promise, made by a corporation, to do an act which its charter does not authorize, even though the company may be held liable to pay damages for the breach of its agreement.¹ This doctrine was recognized in *Bank of Michigan v. Niles*.² A banking company, which had entered into an agreement involving the sale of certain real estate, applied for a decree of specific performance against the purchaser; but relief was refused, on the ground that the transaction was in violation of the company's charter. The Chancellor said: "The corporation exceeded its powers, and contracted to do what it had no right to do under its charter, when it covenanted to purchase the mill property of Pierson, and to convey three fourths of it to defendant. It was an arrangement to buy real estate of one individual to sell to another; a contract to violate its charter, by embarking in a business with which it had no right to meddle,—a contract which, for that reason, this court cannot, consistently with equitable principles, assist the complainant to carry into execution. Equity will aid no one in doing that which is unlawful. . . . The case of *The Banks v. Poitiaux*, 3 Rand. R. 186, goes no further than this, that the corporation, having purchased the land, might make a deed of it; not that it might make a contract with A to purchase the lands of B, and sell them to A, which is the case before me."³

¹ *Hitchcock v. Galveston*, 96 U. S. 341, 351, *per* Justice Strong. See *Seely*, 45 Mo. 212; *Land v. Coffman*, 50 Mo. 243. Compare *The*

² *Bank of Michigan v. Niles*, Walker (Mich.), 99, 101. *Banks v. Poitiaux*, 3 Rand. (Va.) 186; *Eastern Counties Ry. Co. v.*

³ See also *Pacific R. R. Co. v. Hawkes*, 5 H. L. C. 331.

§ 682. **Active Trusts not Enforceable.**— Upon the same principle, it follows that, if a corporation assumes an active trust in excess of its charter, the performance of the trust cannot, as a rule, be enforced, if this would compel the company to commit a further breach of the law. But the trust will not, on that account, be held void, at the expense of the beneficiary. A new trustee may in certain cases be substituted by the proper court, or just compensation may be granted.¹

§ 683. **A Contract permanently altering the Constitution of a Corporation cannot be enforced. — Excessive Issues of Certificates for Shares.**— If the execution of a contract entered into by a corporation in violation of its charter would result in a permanent alteration of the company's constitution, such contract can under no circumstances be enforced. Thus, a corporation cannot be compelled to recognize the validity of certificates for shares of stock in excess of the amount authorized by its charter. By forcing the corporation to acknowledge the validity of such certificates, and treat the holders as shareholders, the corporation would be compelled to alter its constitution, and commit a continuing violation of the law thereafter.

It has therefore been held that a corporation cannot be compelled to recognize the validity of shares of stock created in excess of the amount authorized by its charter, even though the company would be liable to the innocent purchasers of certificates issued on account of these shares for any damages suffered by reason of their invalidity.²

§ 684. **When Specific Performance of an Obligation created in Violation of the Charter may be decreed.**— The payment by a corporation of money which it has agreed to pay, or the payment of compensation for a tort, or for the violation of a just engagement, is not contrary to public policy, and is not

¹ See *per Justice Story*, in *Vidal Co.*, 78 N. Y. 159, a portion of the shareholders of the company were *v. Girard's Exrs.*, 2 How. 188.

² *New York, &c. R. R. Co. v. Schuyler*, 34 N. Y. 30, 49, 50; and accorded a preference at the expense of the remainder, but there was no excessive issue of new shares, and see further upon this subject, *infra*, §§ 761-766.

In *Kent v. Quicksilver Mining* corporate franchises.

prohibited by law, though the commission of the tort or the creation of the engagement may have involved an unauthorized exercise of corporate power. In many instances, there would be a legal obligation to make such payment. Thus, a corporation may be compelled to make compensation for a tort,¹ or a breach of trust; also for the breach of an unauthorized contract, if the other contracting party had no notice of the illegality,² or if the contract was executed by such other party.³

And if under these circumstances the specific performance of the contract on the part of the corporation would involve merely a payment of money or the performance of any act which would not necessitate a further departure from the company's chartered purposes, a decree of specific performance of the contract may be granted against the corporation, provided the complainant be entitled to that relief on equitable grounds.⁴

C.

§ 685. **Unauthorized Contracts are Voidable while unperformed.**—It seems but reasonable that a contract which is forbidden by law, and which may subject the company making it to the penalty of dissolution, should not be held obligatory, except for strong reasons of equity. Either party should be allowed to withdraw, so long as a rescission can be effected without injustice. Accordingly, it has been held that a contract, entered into by a corporation in excess of its charter, may be avoided by either party so long as it remains unexecuted by both parties.⁵

This doctrine has been affirmed by the courts in a very large number of cases. It has frequently been decided that

¹ *Infra*, § 725 *et seq.*

² *Infra*, § 686 *et seq.*

³ *Infra*, § 689 *et seq.*

⁴ Compare *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. C. 331.

⁵ See also *Crutcher v. Nashville Bridge Co.*, 8 Humph. 408; *San Francisco Gas Co. v. San Francisco*,

9 Cal. 453, 472; *State Board v. Citizens', &c. Ry. Co.*, 47 Ind. 407, 411; *Whitney Arms Co. v. Barlow*, 63 N. Y. 68; *Arnot v. Erie Ry. Co.*, 67 N. Y. 319; *Oil Creek, &c. R. R. Co. v. Penn. Trans. Co.*, 83 Pa. St. 160, 166; *Morgan v. Donovan*, 58 Ala. 241.

- 253

a suit for damages may be maintained upon a contract entered into by a corporation, in violation of its charter, provided the contract has been performed on either side; but in each instance the right to recover was placed expressly on the ground that the contract had been executed, and it was assumed that, if the contract had remained unexecuted, it would not have been binding upon either party.¹

D.

§ 686. **The Fact that a Corporation had no Legal Right to enter into a Contract is not a Ground for treating such Contract void as against an Innocent Party having no Notice of the Excess of Authority.** — It has been pointed out heretofore, that all persons dealing with a corporation must at their peril take notice of the contents of its charter; and that no agent of a corporation has authority to bind the company by a contract

¹ See cases *infra*, § 689 *et seq.*

In *Bradley v. Ballard*, 55 Ill. 417, a bill in equity was filed by a shareholder of a corporation, to restrain the prosecution of an action at law, brought against the company upon certain promissory notes which it had executed for borrowed money. The complainant claimed that the notes were void, because they had been issued by the company in violation of its charter; and it was contended that a corporation could not be estopped from setting up the invalidity of a contract made in violation of its charter, because, if such a defence were allowed, a corporation might enlarge its powers indefinitely.

The court, however, held that no such consequence would follow, for the reason that the doctrine of estoppel could be applied only when justice required its application, and after the unauthorized contract had been executed. Justice Lawrence,

delivering the opinion of the court, said: "This doctrine is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits for the purpose of enforcing a contract. Not only so, but on the application of a stockholder, or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So, too, if a contract *ultra vires* is made between a corporation and another person, and while it is yet wholly unexecuted the corporation recedes, the other contracting party would probably have no claim for damages."

which is not authorized by its charter.¹ As a consequence, it follows that, if the fact that the execution of a particular contract by a corporation is not authorized by its charter can be ascertained by comparing the terms of the contract with the terms of the charter, all persons would be obliged, at their peril, to take notice, first, that no authority was delegated to the agents of the corporation to bind it by such a contract, and, secondly, that the corporation itself could not enter into the contract without exceeding its chartered powers.

Whether the execution of a particular contract by a corporation is authorized by its charter cannot, however, always be ascertained by a mere inspection of the company's charter. The purpose for which the contract was made, and all the circumstances of the transaction, must then be considered. A contract authorized for a certain purpose, or under certain circumstances, may be wholly unauthorized under a different state of facts.² A person dealing with an agent is not in all cases bound, at his peril, to ascertain the existence of all the facts upon which the agent's authority to act depends. It is an established rule of the law of agency, that, if an agent of a corporation is invested with apparent authority to execute a particular kind of contract under ordinary circumstances, a person who in good faith enters into such a contract with the agent, relying on his apparent powers, may charge the company with the act, although the agent may in reality have exceeded his authority.³ It is likewise established, that the corporation cannot, under these circumstances, set up as a defence that the making of the contract was in excess of its chartered powers, and therefore prohibited by law. This rule is settled beyond a doubt by numerous adjudications;⁴ the reasons on which it is based have been discussed heretofore.⁵

§ 687. *Illustrations.*— In *Stoney v. American Life Insurance Co.*,⁶ Chancellor Walworth held that “a negotiable

¹ *Supra*, §§ 580, 591.

² See *supra*, § 362.

³ *Supra*, § 585 *et seq.*

⁴ See cases cited in § 597 *et seq.*

⁵ *Supra*, §§ 650–653.

⁶ *Stoney v. American Life Insurance Co.*, 11 Paige, 635.

security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the corporation, and in violation of the laws of the State where it was actually issued." Again, in *Safford v. Wyckoff*,¹ the Chancellor said: "A bill or any other negotiable security, which is not upon its face illegal and unauthorized, is valid in the hands of a *bona fide* holder without notice, who has paid a valuable consideration therefor, except in those cases in which the security is made void by statute." A similar doctrine was asserted by Denio, J., in a subsequent case.² And in *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, Selden, J., after quoting the above statements of the law with approval, added: "I have no hesitation in concurring with these learned judges in the principles thus asserted, and am not aware that a contrary opinion has ever been judicially expressed."³

Upon the same principle, it has been held that a debt incurred by a corporation for an unauthorized purpose is binding upon the company, if the creditor acted in good faith and without notice of the unauthorized purpose;⁴ and if a corporation has authority to borrow to a certain amount only, the company will nevertheless be liable upon a loan made in excess of that amount, if the lender had no notice that the borrowing powers of the company were exhausted.⁵

§ 688. *Specific Performance of Contracts.* — A court of equity will even decree the specific performance of a contract entered into by a corporation in violation of its charter, if

¹ *Safford v. Wyckoff*, 4 Hill, Wall. 604, 644; and see cases cited *supra*, § 597.

² *Bank of Genesee v. Patchin* Bank, 13 N. Y. 309.

³ *Farmers', &c. Bank v. Butchers', &c. Bank*, 16 N. Y. 125, 129. See also *Madison, &c. R. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 461; *Merchants' Bank v. State Bank*, 10

Bradley v. Ballard, 55 Ill. 413; *Thompson v. Lambert*, 44 Iowa, 239. See *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *Tracy v. Talmage*, 14 N. Y. 162.

⁵ *Ossipee, &c. Manuf. Co. v. Canney*, 54 N. H. 296.

relief of that character is required in order to protect the rights of a party who dealt with the company in good faith and without notice. Thus, in *Eastern Counties Railway Co. v. Hawkes*,¹ a land-owner who had entered into a contract with a railway company to sell his estate obtained a decree of specific performance of the contract, although the company had no right to purchase the property. It was argued in the House of Lords, that a company could not be compelled to execute a contract which it could not lawfully make. But Lord Campbell said: "If the contract is *ultra vires* with the knowledge of the party making it, he cannot afterwards enforce it; but if he has no such knowledge, it would be binding in his favor."

E.

After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defence to an action brought by the party having performed the contract, to recover compensation for a breach of the contract by the other party.

§ 689. **The Principle of the above Rule.** — The reasons upon which the rule above stated is based, have been fully discussed in a previous part of this chapter.² They may be summed up as follows. The common law prohibition against the unauthorized exercise of corporate powers is founded upon general grounds of public policy, and the legal effect of this prohibition depends upon the requirements of public policy. If a corporation departs from its chartered purposes in violation of the common law prohibition, it may be punished by forfeiture of its franchises at the suit of the State. If a contract is made by a corporation in excess of its chartered powers, either party to the contract may withdraw, so long as a rescission can be effected without injustice. But after

¹ 5 H. L. Cas. 331. Compare ² *Supra*, §§ 648-653.
supra, § 684.

a contract of this character has been performed by either of the parties, the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform the agreement on his side. The authorities bearing upon this doctrine are conflicting, and the principles which underlie it have frequently been misstated and misunderstood. It is desirable, therefore, to point out the exact scope and meaning of the rule above stated, before referring in detail to the cases in which it has been applied.

§ 690. *Questions of Agency distinguished.* — The Rule relates only to the Effect of a Legal Prohibition. — In determining the legal effect of a contract made with a person assuming to act as agent on behalf of a corporation, it is necessary to consider first whether the corporation can be charged with the contract according to the established rules of the law of agency. If the corporation is not chargeable on applying the rules of the law of agency, it is plain that the rule now under consideration has no application whatever. This rule relates solely to the effect of the common law prohibition against any unauthorized exercise of corporate power on the part of the corporation itself; and it applies only where the corporation would be chargeable with the prohibited contract, if the legal prohibition were not in the way.

It has been pointed out, that every contract which is not authorized by the charter of a corporation is in excess of the authority delegated by the company to any of its agents. It follows, therefore, that a corporation cannot be charged with a contract which is in excess of its charter, unless the contract was either assented to, or ratified by, the whole body of shareholders constituting the corporation; or unless the party dealing with the agent of the corporation had a right, as against the latter, to assume that the contract was within the agent's authority.

The fact that a contract made by an agent in excess of his authority has been performed by the other party, is clearly not of itself sufficient to render the contract binding upon the person for whom the agent assumed to act.¹

¹ *Supra*, § 581.

§ 691. **Other Common Law and Statutory Prohibitions to be distinguished.** — The rule under consideration relates only to the effect of the common law prohibition against the unauthorized exercise of corporate powers. It has no application to contracts which are illegal because expressly prohibited by statute, or because of some general principle of the common law irrespective of the prohibition against unauthorized corporate action. If a contract is prohibited by statute, the proper construction of the statute must be considered, and if it is in violation of some general principle of the common law or of public policy, the general rules of the common law must be applied.¹

The case of *Thomas v. The West Jersey Railroad Company*,² may be referred to in this connection. The defendant had made a lease of all of its property and franchises to the plaintiffs for twenty years, reserving an option to put an end to the lease upon giving three months' notice. In that event the plaintiffs were to be paid the value of the unexpired term. After the lessees had been in possession under the contract for a number of years, the railroad company elected to put an end to the lease; and the road was thereupon restored to the company. An action of covenant was then brought by the lessees, on account of the failure of the company to pay the value of the unexpired term, as provided in the contract.

The Supreme Court decided that the plaintiffs were not entitled to recover. It was contended for the plaintiffs, that the doctrine of *ultra vires* had no application, because the contract had been executed on their part. But the court held that the suit was brought for the enforcement of a part

¹ See cases *supra*, §§ 654-680.

² *Thomas v. West Jersey R. R. Co.*, 101 U. S. 86, 87; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 23 Fed. Rep. 232. That rent actually due by the terms of an unauthorized lease of a railroad may be recovered, see *Peterborough R. R. Co. v. Nashua, &c. R. R. Co.*, 59 N. H. 385. Compare *Woodruff v.*

Erie Ry. Co., 98 N. Y. 609; *Vermont, &c. R. R. Co. v. Vermont Central R. R. Co.*, 84 Vt. 47, 48. See *supra*, § 656.

It should be observed, that the Supreme Court, in the case cited in the text, referred with approval to the rule laid down by Comstock, C. J., in *Parish v. Wheeler*, 22 N. Y. 494.

of the agreement which had not been executed, and that the agreement must be treated as void in any event, for reasons of public policy. Upon the latter point Mr. Justice Miller, delivering the opinion of the court, said: "It is a contract forbidden by public policy, and beyond the power of the defendants to make. Having made this agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to the stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts. We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction."

§ 692. *The Rule is not based on an Estoppel.* — The rule is not based upon the doctrine of estoppel, as has sometimes been suggested.¹

An estoppel *in pais* involves a representation of a fact upon the faith of which an innocent party has been induced to alter his position. The rule referred to, however, applies where both parties to the contract had notice that it was in excess of the chartered powers of the corporation, and therefore prohibited by law. It applies in favor of a corporation

¹ Bradley v. Ballard, 55 Ill. 418, 848, 854; City of St. Louis v. St. 417; Chicago Building Society v. Louis Gas Light Co., 70 Mo. 69, Crowell, 65 Ill. 454, 459; Racine, 100; Oregonian Ry. Co. v. Oregon &c. R. R. Co. v. Farmers' L. & T. Ry. & Nav. Co., 22 Fed. Rep. 245; Co., 49 Ill. 346, 347; Newburg Petroleum Co. v. Weare, 27 Ohio St. s. c. 23 Fed. Rep. 232.

which seeks compensation after having performed contract in excess of its chartered powers, as well as in favor of a party contracting with a corporation, where the latter breaks the contract after the stipulations for its benefit have been performed.¹

Moreover, the doctrine of estoppel cannot be invoked by an individual so as to defeat the operation of a rule of law established for the benefit of the community in general. The legal prohibition against the unauthorized exercise of corporate powers is established for the benefit of the public, on general grounds of expediency, and not for the benefit of corporations, or of persons dealing with them. The effect of the prohibition upon a contract, therefore, depends wholly upon the requirements of the public policy pursuant to which the prohibition was established.²

§ 698. *The Authorities in Support of the Rule. — Suits upon unauthorized Contracts. —* *Whitney Arms Company v. Barlow*³ contains a clear statement of the law upon this subject, as it is now settled in New York. A company incorporated for the purpose of manufacturing fire-arms and other implements of war entered into a contract to manufacture railroad locks. Having manufactured and delivered a large number of locks in accordance with the contract, it was held that the company was entitled to recover the price agreed upon. Allen, J., in delivering the opinion of the Court of Appeals, said: —

"It must be conceded that the manufacturing and vending of 'railroad locks' is not within the purpose for which the plaintiff was incorporated, or within the powers conferred by its charter. Neither is such business incidental to the

¹ See *Silver Lake Bank v. North*, never sustains a defence of this nature out of regard for a defendant; *4 Johns. Ch. 370*; *Steam Nav. Co. v. Weed*, 17 Barb. 379; *Whitney Arms Co. v. Barlow*, 63 N. Y. 68, it does so only where an imperative rule of public policy requires it. *69*; *National Bank v. Matthews*, 98 U. S. 621; *Southern Life Ins., &c. Co. v. Lanier*, 5 Fla. 110; and see cases cited in the following sections. The instances are rare in which a corporation has been permitted to set up its own wrong in order to retain both the property and its price."

² See *supra*, §§ 648-653. In *Wright v. Pipe Line Co.*, 101 Pa. St. 204, the court said: "The law ³ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

purposes of the incorporation, or in any way necessary to, or, as far as appears, even an aid in the exercise of the powers conferred upon the plaintiff by its constitution, so that it could be regarded as among the implied powers granted by the legislature and assumed by the corporators.

“ Did the question now made arise upon an application by the stockholders and corporators to restrain the corporate agents from applying the corporate funds to purposes foreign to the corporation, or engaging in business outside of that for which the company was formed; or on proceedings by the sovereign power to annul the charter for an abuse of the powers granted; or in a proceeding to enforce, and for the performance of, an executory contract, where, upon a rescission or annulling of the agreement, both parties would have the same position as if no contract had been made,— the rules of decision would be different from those which must prevail in the present action. In either of the cases suggested, it is very likely the courts would be compelled to give full effect to the objection, and hold the business unauthorized and a violation of the charter, and a forfeiture of the chartered rights, and the contract null, and refuse to perform or give effect to it.

“ The manufacture of the locks, and contract to sell them to the Seal Lock Company, were not acts immoral in themselves or forbidden by any statute, neither *mala in sese* nor *mala prohibita*, so as to make the contract illegal and incapable of being the foundation of an action; such a contract as the law will not recognize or enforce, but, applying the maxim, *Ex facto illicito non oritur actio*, leave the parties as it finds them.

“ When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created.

"Whether the contract as originally made was *ultra vires*, is not a very important inquiry at this time. If it was, the State under whose sovereignty it dwells, and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed and a work fully accomplished, whatever may be its right to annul its charter. The shareholders, whose confidence has been abused, and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody, and applying to legitimate uses, the funds which have been diverted and improperly used for purposes *dehors* the legitimate business of the corporation. The plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong."¹

§ 694. **Acts performed under Unconstitutional Charters.** — A clear illustration of the application of the rule is furnished by the case of *Prairie Lodge v. Smith*.² In that case suit was brought against a corporation to enforce certain contracts made by the company for the erection of a Masonic temple. These contracts were authorized by a provision in the instrument under which the corporation had been organized; but it was insisted on behalf of the corporation that this provision was itself illegal, because unauthorized by the general

¹ 63 N. Y. 68, 69. See also *De Rutland, &c. R. R. Co. v. Proctor*, 29 Vt. 96, 97; *Ward v. Johnson*, 95 Co., 21 N. Y. 124, 127; *Parish v. Ill.* 215; *Hall Manuf. Co. v. American Ry. Supply Co.*, 48 Mich. 331. *In State of Indiana v. Woram*, 6 Hill, 38, 37, *Bronson, J.*, said: "Since the decision of *Moss v. Ros-sie Mining Co.*, 5 Hill, 137, I do not see that a corporation can ever avoid its obligation on the ground that it was given for property which the corporation was not authorized to purchase." See also cases *infra*, §§ 707-712.

² *Prairie Lodge v. Smith*, 58 Grov. v. Talcott, 19 Wall. 666, 678; Miss. 301, 308.

incorporation laws under which the corporation was formed. The court, however, held that this would not be a defence. George, J., in delivering the opinion, said: "Every member of the corporation became such under this charter, and they assented to the exercise by the corporation of the power to make the contracts. They did make the contracts, and receive the benefit of them in the erection of the building, which is now their property. They will not be permitted now to allege the invalidity of their charter in defence of an action to compel them to pay for the benefit thus received. The question presented is different from that which would be presented if the contract were made by the managers without the consent of the corporators, and also without the powers specified in the charter. In that case the stockholders, as principals, might possibly be allowed to aver the want of power in their agents, the managers, to bind them, and that they had been thus compelled to enter into a business outside of the scope of their agreement."¹

§ 695. **Actions for Borrowed Money.** — The principle of the rule applies with much force in an action for borrowed money. In *Steam Navigation Company v. Weed*,² a corporation sued for money which it had lent to the defendants. The defence was that the company had no authority under its charter to make the loan. But the court said: "It ill becomes the defendants to borrow from the plaintiff \$1,000 for a single day, to relieve their immediate necessities, and then to turn around and say, 'I will not return you this money, because you had no power by your charter to lend it.' Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the State of Connecticut the extent of the plaintiff's chartered privileges. We shall lose our respect for the law, when it so far loses its character for justice as to sanction the defence here attempted. . . . When it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of powers conferred by the charter, a

¹ 58 Miss. 308. See also *infra*, §§ 759, 760.

² *Steam Navigation Co. v. Weed*, 17 Barb. 378.

party who has had the benefit of the contract cannot be permitted to question its validity in an action founded upon it."¹ This case has been frequently cited with approval.

It has been held that a loan of money made by or to a corporation, in violation of the usury laws, may be enforced, if a similar contract made between individuals would be enforceable. Yet it is clear that a corporation can have no authority, under its charter, to enter into a contract prohibited by law.² The same rule has been applied in actions for money borrowed or lent by a corporation in violation of an express prohibition contained in its charter. Both the contract and security have been enforced in cases of this character.³

It has repeatedly been decided, that, in an action for the purchase price of property sold and delivered by or to a corporation, it is not a defence that the sale involved an unauthorized exercise of corporate power on the part of the company.⁴

§ 696. *Other Cases within the Rule.* — The rule discussed in the preceding sections applies to all classes of contracts entered into by corporations. Thus, a mortgage or pledge of property executed by or to a corporation for a valuable consideration is binding and legally enforceable, though its execution or acceptance was not authorized by the company's charter.⁵ It must, of course, be assumed in this, as well as

(249) ¹ 17 Barb. 382, 384. See also *Watson*, 2 Baxt. (Tenn.) 173; *Rock River Bank v. Sherwood*, 10 Wis. 230; and see cases *supra*, §§ 667-669.

² *Gold Mining Co. v. National Bank*, 96 U. S. 640; 2 Col. 259; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *National Bank v. Matthews*, 98 U. S. 628; and see cases *supra*, §§ 673, 678.

³ *Wright v. Pipe Line Co.*, 101 Pa. St. 204; *Union Nat. Bank v. Hunt*, 7 Mo. App. 42. See *infra*, § 707 *et seq.*

⁴ *Jones v. Guaranty, & Co.*, 101 U. S. 622; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *National Bank v. Matthews*, 98 U. S. 621.

⁵ 17 Barb. 382, 384. See also *Bradley v. Ballard*, 55 Ill. 413, 417; *Darst v. Gale*, 83 Ill. 141; *Pooch v. Lafayette Building Ass.*, 71 Ind. 357; *Millard v. St. Francis, & Co. Academy*, 8 Bradw. 341; *Johnston v. Elizabeth Building, & Co. Ass.*, 104 Pa. St. 394; *Allen v. Freedman's Sav., & Co.*, 14 Fla. 418, 428; *Union Water Co. v. Murphy's Flat, & Co.*, 22 Cal. 621; *Hays v. Galion Gas, & Co.*, 29 Ohio St. 340. *Contra*, *Grand Lodge of Alabama v. Waddill*, 36 Ala. 313. Compare *New York, & Co. Ins. Co. v. Ely*, 5 Conn. 560.

⁶ *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Perkins v.*

in all other instances in which the rule is applied, that the corporation can be charged, according to the principles of the law of agency, with the acts of those who assume to create the obligation on its behalf.

Upon the same principle, it follows that an agreement of guaranty or indemnity, executed by a corporation for a valuable consideration, may be enforced, though the execution of the agreement involved unauthorized corporate action on the part of the company.¹ A railroad company having executed a contract of guaranty and received an indemnity mortgage from the debtor, the latter cannot avoid the mortgage on the ground that the company had no legal right to execute the guaranty.²

In *State Board of Agriculture v. Citizens' Street Railway*,³ a corporation chartered for the purpose of managing a street railway agreed to pay the State Board of Agriculture the sum of \$1,000, in order to induce the board to locate the annual State fair at a certain point upon the defendant's line of road. The fair was located accordingly, but the railway company refused to pay the money which it had agreed to pay. The Board of Agriculture then brought suit upon the contract. A demurrer was interposed, and it was contended that the contract was void for want of authority on the part of the railway company to make it. But the Supreme Court held that it was immaterial whether or not the company had authority to make the contract, inasmuch as it had been performed by the complainant.

§ 696 a. *Foreign Corporations.* — The same rule was applied, in an action brought by a corporation chartered by a foreign State, upon a contract which it had executed on its side. The defendant in the action contended that the plaintiff

¹ Compare *Arnot v. Erie Ry. Co.*, 67 N. Y. 319; *Zabriskie v. Cleveland, &c. R. R. Co.*, 23 How. 381, 400; *Bank of South Carolina v. Hammond*, 1 Rich. L. 281.

² *Macon, &c. R. R. Co. v. Georgia R. R. Co.*, 68 Ga. 103.

³ *State Board of Agriculture v.*

Citizens' Street Ry. Co., 47 Ind. 407. The opinion in this case contains a clear statement of the law. It was cited with approval in *Hitchcock v. Galveston*, 96 U. S. 351. Compare *Davis v. Old Colony R. R. Co.*, 131 Mass. 258.

could not recover, because the company had not been legally organized, and because the execution of the contract was in excess of its charter. But the court held that the fact that the company had not been legally organized, and that the execution of the contract was an unauthorized exercise of corporate power, would not be a defence.¹

§ 697. *Partnerships.* — It follows, upon the same principle, that, if two corporations consolidate or form a copartnership, and afterwards enter into a contract as a consolidated company or jointly as partners, they cannot set up the fact that they had no legal right to effect a consolidation, or to enter into a copartnership, as a defence to an action brought upon such contract, after it has been performed by the plaintiff.²

§ 698. *Additional Authorities.* — In addition to the authorities cited in the preceding sections, reference may be made to the cases in which it was held that, although a company entering into a contract in a corporate capacity had not been legally incorporated, this fact could not be set up as a defence to an action brought by or against such corporation upon the contract, after it had been executed by the party bringing suit. It is evident that an association which has not been legally incorporated has no right to act in a corporate capacity under any circumstances; every act of such an association involves an unauthorized exercise of corporate power, and is prohibited by law.³

It is clear that a corporation can have no authority to enter into a contract expressly prohibited by its charter. Yet there are numerous cases in which contracts made by a corporation in violation of an express provision of its

C-253
¹ *Newburg Petroleum Co. v. &c. R. R. Co.*, 22 N. Y. 258, 263; *Weare*, 27 Ohio St. 343, 354. See *Racine, &c. R. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331, 347; *Catskill Bank v. Gray*, 14 Barb. 471; *Johns. Ch.* 370; *Whitney Arms Co. v. Barlow*, 63 N. Y. 68, 69; *Steam Allen v. Woonsocket Co.*, 11 Nav. Co. v. Weed, 17 Barb. 378. R. I. 288. See also *infra*, § 757. Compare *per* Chief Justice Taney *Compare Pearce v. Madison, &c. in Bank of Augusta v. Earle*, 13 R. R. Co., 21 How. 441, and *supra*, Pet. 519, 587. See *infra*, § 756. § 581.

² *Bissell v. Michigan Southern*,

³ *Infra*, Chapter IX.

charter have been held binding, after having been performed on either side.¹

Again, it is well settled by authority, that a transfer of property made by or to a corporation will not be inoperative merely because authority to make or to receive the transfer was not conferred upon the company by its charter.²

Numerous cases have been cited in which it was held that a contract made by an agent of a corporation in violation of its charter may become binding upon the company after having been ratified by the shareholders. The want of authority on the part of the company itself to enter into the contract seems to have been immaterial in these cases, for the reason that the contract had been executed by the complainant.³

§ 699. **Conflicting Authorities.**— There are numerous *dicta* which cannot be reconciled with the views expressed in the preceding sections.⁴ It is, however, often a difficult matter

¹ *Supra*, §§ 655-680.

² *Infra*, §§ 707-718.

³ *Supra*, §§ 619-635.

⁴ See *New York, &c. Ins. Co. v. Ely*, 5 Conn. 560; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557; *Hood v. New York, &c. R. R. Co.*, 22 Conn. 502; *s. c.* 28 Conn. 609; *Converse v. Norwich, &c. Trans. Co.*, 33 Conn. 166, 180; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; *Pennsylvania, &c. Nav. Co. v. Dandridge*, 8 G. & J. 248, 319; *Maryland Hospital v. Foreman*, 29 Md. 524; *Albert v. Savings Bank*, 1 Md. Ch. 407; *Boyce v. Towsontown, &c. Church*, 46 Md. 359; *Smith v. Alabama Life Ins., &c. Co.*, 4 Ala. 558, 568; *Montgomery v. Montgomery, &c. Plank Road Co.*, 31 Ala. 76; *Grand Lodge of Alabama v. Waddill*, 36 Ala. 813; *Marion Savings Bank v. Dunkin*, 54 Ala. 471 (compare, however, *Morgan v. Donovan*, 58 Ala. 241, 255); *Whitney v. First National Bank*, 50 Vt. 388; *City Fire Ins. Co. v. Carrugi*, 41 Ga.

660, 673; *Hazlehurst v. Savannah, &c. R. R. Co.*, 43 Ga. 13; *Orr v. Lacey*, 2 Dougl. (Mich.) 230; *Madison, &c. Plank Road Co. v. Watertown, &c. Plank Road Co.*, 7 Wis. 59; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655; *Germantown, &c. Ins. Co. v. Dhein*, 48 Wis. 421; *Dietrich v. Madison Relief Ass.*, 45 Wis. 79; *Haynes v. Covington*, 21 Miss. 408; *Littlewort v. Davis*, 50 Miss. 403; *Memphis v. Memphis, &c. Gas Co.*, 9 Heisk. 543; *Whitman, &c. Mining Co. v. Baker*, 3 Nev. 386; *Farmers', &c. Bank v. Harrison*, 57 Mo. 503; *Matthews v. Skinker*, 62 Mo. 329 (overruled 98 U. S. 628); *Rochester Ins. Co. v. Martin*, 13 Minn. 59; *Trenton Mut., &c. Ins. Co. v. McKelway*, 12 N. J. Eq. 133; *Wheeler v. Essex Public Road Board*, 39 N. J. Law, 291; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Franklin Co. v. Lewiston Savings Institution*, 68 Me. 43; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59.

C 245
X

to determine what weight should be given to authorities of this character. In some of the cases the courts have failed to distinguish between the effect of a common law or statutory prohibition, directed against the corporation itself, and the effect of the absence of a delegation of authority by the corporation to the agents assuming to represent it. In other cases the difference between the effect of an express statutory prohibition and the general common law prohibition against all unauthorized corporate action has not been observed. Contracts which were clearly invalid, because expressly prohibited by the legislature, or because the agents making them had no power to bind the company, have been held void on the general ground that they were in excess of the company's charter, and therefore *ultra vires*.

It would serve no useful purpose to discuss decisions of this character in detail. They are merely illustrations of an attempt to decide cases by applying a purely arbitrary rule, instead of the elementary principles of the common law.

§ 700. Much confusion in the law has undoubtedly resulted from the unfortunate use of the term *ultra vires*. Thus, it has sometimes been argued, that a corporation, being a creature of the law, can have no powers except such as are conferred upon it by its charter; and that a contract not authorized by the charter of a corporation must therefore be *ultra vires* of the company, and void.¹

It has been shown, however, that an association has the *power* to act in a corporate capacity, even where it has no legal right to do so; and that an act of a corporation is said to be *ultra vires* because prohibited by law, and not because the company had not the power to perform it. An unlawful act of an individual is as much *ultra vires* as an unauthorized act of a corporation.²

§ 701. In *Bissell v. Michigan Southern Railway, Selden, J.*, said: "The contracts of corporations which are not

¹ *Rochester Ins. Co. v. Martin, v. Mt. Washington Road Co.*, 40 13 Minn. 64; *Smith v. Alabama Life* N. H. 280.

Ins., &c. Co., 4 Ala. 568; *Downing* ² See *supra*, § 648, and note.

authorized by their charters are illegal, because they are made in contravention of public policy. That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception."¹

The reply to this argument has already been indicated.² The common law prohibition against unauthorized corporate action is not based upon the ground that such action would be immoral, or would endanger the public welfare. Indeed, the common law prohibition has in a great measure been repealed by the general incorporation laws. Unauthorized corporate acts are contrary to public policy only in the sense in which all acts prohibited by law are contrary to public policy; they are, according to a somewhat unscientific distinction, *mala prohibita*, and not *mala in se*. But even if such acts were contrary to public policy in the strictest sense, the result contended for would not follow. The effect of the prohibition would depend upon the requirements of the policy on which it was founded. If public policy does not actually require that a contract, involving a simple unauthorized exercise of corporate power on the part of a corporation, be treated as void on that account after it has been performed by one of the parties, the courts would have no right to declare it void.³

§ 702. In *Pennsylvania Navigation Company v. Dandridge*,⁴ Dorsey, J., said: "It has been urged that the defendants, having entered into this contract, are estopped from denying their competency to have done so. To the doctrine of estoppel applied to such cases we cannot yield our assent. If the corporation is estopped from denying its power, the estoppel operates with like effect upon those who contract with them, and the result would be that, no matter how limited

¹ *Bissell v. Michigan Southern*, an innocent party without notice. &c. R. R. Co., 22 N. Y. 285. 22 N. Y. 284, 290.

² *Supra*, § 650.

³ In the case above referred to, *hurs v. Savannah, &c. R. R. Co.*, 43 Ga. 55; *Montgomery v. Montgomery, &c. Plank Road Co.*, 31 Ala. 76.

⁴ 8 G. & J. 248, 319; *Hazle-*

the design and powers of a corporation may appear in its charter, practically it is a corporation without limitation as to its powers. Such a doctrine at this day is dangerous to the interest of the community, and is at war with the modern decisions upon the subject."

In reply to this view it may be said, that, if an unauthorized exercise of corporate power is injurious to the public, the State may interfere on behalf of the public, and dissolve the company or restrain its unauthorized acts.¹ A contract made by a corporation in violation of its charter is voidable by either party so long as it remains wholly unperformed. It can be enforced only when justice plainly requires its enforcement, and after the mischief resulting from the unauthorized exercise of corporate power has been done.²

§ 703. It has been held in some of the cases, that, while an action cannot be based upon a contract made in violation of the charter of a corporation after it has been performed by one of the parties, yet that a suit brought without reference to the contract may be maintained for the value of the benefits received.³ This rule is based upon the doctrine that a contract made by a corporation without authority is void in legal contemplation, but that it is not so immoral or illegal that the courts must refuse to interfere on behalf of either party.

It has been shown, however, that there is no reason why an unauthorized contract of a corporation should not be recognized and enforced whenever justice requires its enforcement. The rule that a suit may be brought for an accounting, or upon the common counts, but not upon the contract itself, seems based upon a technicality. In some cases the measure of recovery allowed under this rule would fail to do

¹ *Infra*, Chapter XIV.

² *Supra*, § 685. See *per* Chief Justice Lawrence in *Bradley v. Ballard*, 55 Ill. 417.

³ *Bissell v. Michigan Southern, &c. R. R. Co.*, 22 N. Y. 805, *per* Selden, J.; *Allen v. Freedman's Savings, &c. Co.*, 14 Fla. 418;

Northwestern, &c. Packet Co. v. Shaw, 37 Wis. 655; *Maryland Hospital v. Foreman*, 29 Md. 524; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230. *Contra*, *Grand Lodge of Alabama v. Waddill*, 86 Ala. 313. Compare cases cited *infra*, § 715 *et seq.*

—C245

justice; it might exceed or fall below that fixed upon by the parties to the agreement. In other cases there would be no remedy at all, for a purely technical reason; for in certain cases no action could be maintained except an action upon the contract itself.

§ 704. In *Haynes v. Covington*,¹ Mr. Justice Smith said, in delivering the opinion of the court: "The distinction is obvious between a contract by a corporation, made in reference to a subject lying entirely without the range of the objects for which its powers were granted, and an irregular or illegal exercise of a right conveyed by its charter. If a corporation makes a contract entirely foreign to the purposes of its institution, the act is void simply for want of power in reference to the subject matter. But where a corporation enters into a contract in reference to a subject matter embraced within the scope of its granted powers, but in so doing exceeds them, the contract will not thereby be rendered void. It might constitute a ground for the resumption of its franchises by the State, but could not be objected by the party sought to be charged." A similar doctrine has been expressed in other cases.²

The distinction above referred to is not obvious to the writer. A contract made by a corporation is either authorized or not authorized by its charter; and if the contract is unauthorized, it would seem to be immaterial whether it was unauthorized because the company made it in an unauthorized manner, or because the company had no power "in reference to the subject matter," or because the company entered into the contract "in reference to a subject matter embraced within the scope of its granted powers, but in so doing exceeded them." In either case, the contract would be equally within the general common law prohibition against

¹ *Haynes v. Covington*, 21 Miss. 421; *Ehrman v. Union Central Ins. Co.*, 35 Ohio St. 324; *Whitman, &c. Mining Co. v. Baker*, 8 Nev. 386;

² *Littlewort v. Davis*, 50 Miss. 403; *Hazlehurst v. Savannah, &c. R. R. Co.*, 48 Ga. 13, 55; *German-town, &c. Ins. Co. v. Dhein*, 43 Wis. 543; *Farmers', &c. Bank v. Harrison*, 57 Mo. 503; *Memphis v. Memphis, &c. Gas Co.*, 9 Heisk. 543.

all unauthorized corporate action. Moreover, the distinction is an arbitrary one, and no two minds would agree where the line should be drawn.

§ 705. *The English Authorities.* — Mr. Brice, in his treatise on the doctrine of *ultra vires*, has stated the result of the English authorities to be as follows: "In every case, without exception, an *ultra vires* contractual engagement, executed or not, is not enforceable; nor is any part thereof enforceable by an action directly upon the engagement itself; the most that the party complaining can obtain is an account."¹ With respect to the law in the United States the learned author said: "It is submitted that the correct view in the United States is the same as that held in this country, — that there is no difference between executed and executory *ultra vires* transactions with respect to actions directly upon them, or to rights and liabilities arising directly upon and out of them."²

The rule here stated is evidently unintelligible unless it is understood exactly what Mr. Brice means by the words *ultra vires*; and it is apparent that the rule is of no practical value unless some method is indicated of ascertaining, in any given case, whether a transaction is in fact *ultra vires* within the meaning attributed to those words.

Mr. Brice has explained in Part II. of his treatise what he intends to express by the words *ultra vires*. The explanation is, that an act is said to be *ultra vires*, not because it is illegal, nor because it is in excess of the powers of the majority or of the company's agents;³ nor is every act which is in violation of the charter or constating instruments of a corporation necessarily *ultra vires*.⁴ But the true and primary

¹ Brice on *Ultra Vires* (2d Eng. ed.), 762.

² Ibid. 764.

³ Ibid. 52-56. Mr. Brice here refers to the distinction pointed out by Kindersley, V. C., in *Shrewsbury v. North Staffordshire Ry. Co.*, 35 L. J. Ch. 166, 172. "When you speak of *ultra vires* of the company, you mean one or other of two things, — either that you cannot bind

all the shareholders to submit to it (i. e. that you cannot bind dissentient shareholders), or that it is *ultra vires* in this respect, that the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbor."

⁴ Thus, contracts made without complying with formalities termed "directory" may be enforced. Mr. Brice quotes with approval from the

meaning of the term *ultra vires*, when used in reference to a corporation, is, "that a corporation has certain powers only, and that it can be bound only when acting, whether directly or by agents, within the limits of these powers."¹

The result of these statements and explanations, therefore, seems to be as follows. A corporation, by a legal fiction, is deemed to have certain powers only; if it actually makes a contractual engagement which according to this fiction it has

opinion of the court in *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 579. See p. 53. Compare *supra*, § 607.

¹ Brice on *Ultra Vires*, 54. In Chapter V., entitled "Leading Principles of *Ultra Vires*," the following general propositions are stated as indicating the chief cardinal principles involved in and making up the doctrine of *ultra vires*:—

"I. A corporation has all the capacities for engaging in transactions which are expressly given it by the constating instruments.

"II. A corporation has all the capacities for engaging in transactions which are impliedly given it by reasonable implication from the language of the constating instruments.

"III. A corporation has all the capacities or powers for management which are given it by its constating instruments, either expressly or by reasonable inference therefrom.

"IV. Capacities or powers for management may be given by wide general language.

"V. Corporations have no capacities or powers other than those indicated in the four previous propositions, and they cannot legally or validly engage in other transactions.

"VI. Courts, in dealing with corporations, will look to those capacities and powers only which they actually possess at the time.

"VII. Corporations cannot be rendered directly liable upon *ultra vires* transactions, but must account for benefits received therefrom.

"VIII. Special proceedings in themselves *ultra vires* will sometimes be upheld as having been rendered necessary by unexpected circumstances.

"IX. Formalities are generally not imperative, but merely directory, and therefore the absence of them can be set up against those persons only who were cognizant of the defect.

"X. Franchises and special privileges or powers in the nature of franchises cannot be delegated.

"XI. Special powers of whatever description can be used only *bona fide* for the purposes for which created.

"XII. The capacities and powers of the governing body, and *a fortiori* those of the subordinate agents of a corporation, cannot be greater, and will generally be much more restricted, than those of the corporation.

"XIII. Any party to an *ultra vires* transaction may set up the defence thereof, and any one corporator may call upon the courts to restrain the corporation from engaging therein." Brice on *Ultra Vires*, 66-68.

no power to make, such engagement will not be enforceable, and is called an *ultra vires* engagement. The question still remains to be answered, by the application of what principle, or by what rule, it is possible to ascertain whether a transaction is within or without the fictitious "powers" of a corporation. It is submitted that this fiction, by which limitations are implied upon the powers of a corporation where none exist in fact, is wholly uncalled for. It is a fiction which adds nothing to the science of the law, and is a fruitful source of confusion and uncertainty.¹

§ 706. Upon examining the authorities, it will be found that the law in England is substantially the same as in the United States upon most of the points discussed in this chapter.

I. It is settled in England, as well as in the United States, that the law of agency applies with full force to corporations. A corporation is not bound by a contract or transfer of property made by an agent on its behalf, if an individual would not be bound under similar circumstances.²

II. In England as well as in the United States a corporation is bound by the acts of its agents, as against a party who was entitled to assume that the agents acted within the authority conferred upon them, although their acts may in fact have been unauthorized and in excess of the company's charter.³

III. In England as well as in the United States a corporation is liable for the torts of its agents, to the same extent as an individual under similar circumstances.⁴

IV. In England as well as in the United States a corpo-

¹ See *supra*, §§ 648-653.

⁴ *Ranger v. Great Western Ry.*

² *Smith v. Hull Glass Co.*, 11 C. B. 897, 926; *Bateman v. Mayor of Ashton*, 8 H. & N. 840; and see cases *supra*, §§ 577-584.

Co., 5 H. L. Cas. 108; *Mackay v. Commercial Bank*, L. R. 5 P. C. 894; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Stiles v. Cardiff, & Co. Nav. Co.*, 88 L. J. Q. B. 810; *Whitfield v. Southeastern Ry. Co.*, El., Bl. & El. 115; and see cases *infra*, §§ 725-734.

³ *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 881; *Royal British Bank v. Turquand*, 6 El. & Bl. 827; *Mayor of Norwich v. Norfolk Ry. Co.*, 4 El. & Bl. 897, 448; and see cases *supra*, §§ 585-717.

ration is not bound by the acts of a majority, except when authorized by the constating instruments of the company.¹

V. In England as well as in the United States a corporation which has, by the unanimous consent of its shareholders, ratified an act performed by an agent on its behalf, will be chargeable with the act according to the principles of the law of agency, although the agent may have had no authority to bind it.²

In the United States it seems that the ratification of a contract made in violation of the charter of a corporation is not alone sufficient to render the contract binding, but that it will remain voidable until executed by either of the parties.³ In England, however, it seems that, if a contract made on behalf of a company was simply unauthorized by its constating instruments, a ratification by the shareholders will be sufficient to render it binding, whether it has been executed or not.⁴

VI. In England as well as in the United States a contractual engagement of a corporation must be treated by the courts as absolutely void, if declared void by the act of incorporation or by general law.⁵

¹ *Burges & Stock's Case*, 2 J. & H. 441; *Bird v. Bird's Patent, &c. Co.*, L. R. 9 Ch. 358; *Pickering v. Stephenson*, L. R. 14 Eq. 340; and see cases *supra*, §§ 621-627.

² *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331, 357; and see cases *supra*, §§ 618-635.

³ *Supra*, §§ 685, 689 *et seq.*

⁴ See *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Riche v. Ashbury Ry. Carriage, &c. Co.*, L. R. 9 Exch. 282, *per* Channell, B.; and cases cited *supra*, §§ 618-685.

⁵ *Supra*, § 655 *et seq.*

Ashbury Ry. Carriage, &c. Co. v. Riche, L. R. 7 H. L. 653, is a leading case upon this subject in England, and appears to have been

very fully considered by all the judges. It may be doubted, however, whether the decision of the House of Lords has added to the certainty of the law on this subject. The facts of the case were as follows.

The defendants were a limited company, incorporated under the Companies Act of 1862. The objects of the company were to sell or lend on hire railway carriages, and all kinds of railway fixtures and materials proper for the use of railways, and to carry on the business of mechanical engineers and general contractors. In 1865 the directors of the company entered into certain contracts on its behalf, by which the company became the purchasers of a concession granted by

So, any transaction of a corporation which is void upon general principles of the common law, or which cannot be sustained with a due regard to the requirements of public

the Belgian government for the construction of a railway in Belgium, and agreed to employ the plaintiff in the construction of the railway, through the medium of another company which the defendants were to form in Belgium. In consideration of the services to be rendered by the plaintiff, the defendants were to make certain specified payments into the treasury of the Belgian company. After the plaintiff had entered upon the construction of the railway, the defendants repudiated the contract. The plaintiff thereupon brought suit to recover damages from the company, for not continuing to make the payments agreed upon.

It was held in the Court of Exchequer (L. R. 9 Ex. 224), by all the judges, that the contracts were *ultra vires*. Channell and Martin, BB., however, held that the contracts had been ratified by the shareholders, and had been thereby rendered binding. Judgment was rendered for the plaintiff, Bramwell, B., dissenting, on the ground that a unanimous ratification by the shareholders had not been shown.

In the Exchequer Chamber (L. R. 9 Ex. 249, 254), Blackburn, Brett, and Grove, JJ., held that the contracts, although beyond the scope of the memorandum of association, and therefore *ultra vires*, were capable of ratification by all the shareholders, and had in fact been ratified by them. On the other hand, Archibald, Keating, and Quain, JJ., held that the contracts were in violation of the memorandum of association and the twelfth section of the act of

1862, under which the company was formed, and that for this reason they could not be made valid, even by the unanimous consent of the shareholders; and, finally, that the contracts had not been ratified, even if that were material.

In the House of Lords (L. R. 7 H. L. 653), the decisions of the Court of Exchequer and the Exchequer Chamber were unanimously reversed. Lord Cairns held that the contracts sued upon were contrary to the memorandum of association of the company and the act of 1862, and were therefore void; and that no ratification could countervail the effects of the statute. "My Lords," he said, "if this be the proper view of the act of Parliament, it reconciles, as it appears to me, the opinions of all the judges of the Court of Exchequer Chamber; because I find Mr. Justice Blackburn, whose judgment was concurred in by the other judges who took the same view, expressing himself thus: 'I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified.' My Lords, that sums up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears

policy, must be treated as invalid.¹ But a prohibited transaction will not be treated as wholly void, if that was not the intent and meaning of the prohibition.²

VII. In England as well as in the United States a corporation cannot set up as a defence to an action upon a contract made in violation of its charter or constating instruments, that the making of the contract involved an unauthorized exercise of corporate power, if the party who dealt with the company had no notice that the contract was unauthorized.³

F.

§ 707. **A Transfer of the Title to Property by or to a Corporation will not be treated as Void merely because the Transaction involved an unauthorized Exercise of Corporate Power on the part of the Company.** — It is necessary for the protection of commerce and the security of property owners, that a purchaser of property from a person having the apparent ownership be protected as far as possible from secret defects in the grantor's title. If a transfer of property by or to a corporation were treated as void, merely for the reason that the company had no authority to make or to receive the transfer, the title to the property would not pass to the grantee; and an innocent purchaser from such grantee would acquire no better title, although he had no notice of the circumstances

that it was the intention of the legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description." As to the construction of the statutory prohibition, see *supra*, § 660.

¹ *Supra*, §§ 655, 656. *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, 812; *MacGregor v. Dover, &c. Ry. Co.*, 18 Q. B. 618.

An unauthorized attempt to transfer the franchises of a corporation is simply ineffective and void. *Be-*

man v. Rufford, 1 Sim. N. S. 550; *Gardner v. London, &c. Ry. Co.*, L. R. 2 Ch. 201, 212; *Richmond Water Works Co. v. Richmond, L. R.* 3 Ch. D. 82. See *infra*, Chapter XI.

² *Supra*, § 672 *et seq.* *Ayers v. South Australian Banking Co.*, L. R. 8 P. C. 548; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 48; *Walton's Case*, 26 L. J. Ch. 545; *Payne v. Mayor of Brecon*, 27 L. J. Exch. 495.

³ *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. C. 381; *Royal British Bank v. Turquand*, 6 El. & Bl. 327; and see *supra*, § 686 *et seq.*

which rendered the prior transfer unauthorized on the part of the company. It would also lead to great practical inconvenience if it were necessary, in an action to determine the ownership of real estate the title to which had passed through a corporation, to determine collaterally whether or not the company had authority under its charter to receive and to make the conveyances of the property.

For these reasons, it has been held that a transfer of property by or to a corporation cannot be set aside, merely because it was unauthorized on the part of the company; but the State alone can complain on account of the unauthorized corporate action.¹

§ 708. Application of the Law of Agency to a Transfer of Property made by or to a Corporation. — The rule stated in the preceding section relates solely to the effect of the common law prohibition against all unauthorized corporate action. The application of the law of agency to a transfer of property made either by a corporation or to a corporation, through its agents, must be considered independently of the rule.

The general rule is, that, if a person assuming to act as agent of a corporation, attempts to receive or to transfer the title to property on behalf of the company, his acts will bind the company only if he had authority to represent it. If the act of the agent was not authorized, it will not, in law, be the act of the corporation.²

However, a conveyance made by an agent of a corporation in excess of his authority may be valid as against an innocent purchaser having no notice of the facts which rendered the transfer unauthorized.³ So, a conveyance executed without precedent authority may be rendered valid and binding by the subsequent ratification of the shareholders.⁴

¹ See the cases *infra*, §§ 710-713.

² *Supra*, § 578. See *Goulding v. Clark*, 84 N. H. 148; *Southern Cal. Colony Ass. v. Bustamente*, 52 Cal. 192.

authority to make a deed on behalf of the corporation. *Supra*, §§ 337-341.

³ *Supra*, § 585 *et seq.*

An agent of a corporation does not necessarily require a power of attorney under seal, in order to have

⁴ *Supra*, § 618 *et seq.* *Darst v. Gale*, 83 Ill. 186; *Moss v. Rossie Mining Co.*, 5 Hill, 137; *Chouteau v. Allen*, 70 Mo. 290.

It should be observed, that, where a conveyance executed to a corporation is void by reason of the want of authority in the agents of the corporation to accept the property on its behalf, the grantor may sue to have the conveyance cancelled as a cloud on his title. But, if the corporation has ratified the acceptance of the property, or if the grounds for attacking the transfer are merely of an equitable character, the grantor must sue for a reconveyance of the property.

§ 708 *a*. **When Authority of the Agent receiving a Transfer may be presumed.**—The rule that a conveyance of property *received* by an agent of a corporation on its behalf will not be operative unless the agent had actual authority to receive it, must be taken subject to important qualifications.

“Delivery to a third person for the use of the party in whose favor a deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.”¹ Very slight evidence is sufficient to show the acceptance of a deed, where it is shown that the grantor intended to deliver it. Mere acquiescence of the grantee is ordinarily a sufficient acceptance to give validity to a deed delivered to an agent having no authority to accept.²

§ 709. **Authorities in Support of the Rule.**—It has been pointed out in a preceding part of this chapter, that, if an act performed by a corporation was apparently within the scope of its chartered powers, the just expectations of persons who in good faith relied on the validity of the act cannot be defeated by showing that it was in fact unauthorized. This principle applies to conveyances of property as well as other corporate transactions. The doctrine that a contractual engagement entered into by a corporation in excess of its charter will not be treated as legally void, if it has been executed by either of the parties, also applies to transfers of property,

¹ *Doe v. Knight*, 5 B. & C. 671. Scott, 6 Sim. 81; and see *supra*,

² See 2 Greenleaf's *Cruise's Dig.* § 629.

p. 334, note 2 [IV. 29]; *Exton v.*

as well as to ordinary contracts. Many of the cases cited in the following sections, in which the validity of a transfer of property made by or to a corporation was sustained, although in excess of the company's charter, may be supported on one or both of these grounds.

It will be observed that, in many of these cases, the courts appear to lay stress upon the fact, that the corporation had authority, under certain circumstances, to receive or execute transfers of property, and that the transfer in question might have been authorized if the required circumstances had existed, although it was unauthorized in that particular instance. This fact, however, is of importance only where the rights of innocent parties dealing with the corporation without notice of the excess of authority are involved. All acts of a corporation which are not authorized by its charter remain equally prohibited by the common law. If a transfer of property is actually unauthorized, and the parties have notice of that fact, it would be immaterial whether all other transfers would also be illegal, or whether some other transfer might, under a different state of facts, be authorized.

§ 710. *Conveyances of Real Estate to a Corporation.* — It has been held that, after a corporation has purchased land, and the conveyances have been regularly executed, it is not proper, on a trial of a suit in ejectment for the recovery of the land, to decide the collateral question whether it was in excess of the charter of the corporation to receive the conveyance. In a case before the Supreme Court of California, Field, C. J., said: "The plaintiffs are an incorporated company under the act of April 14, 1853, by the fourth section of which they are authorized 'to purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require.' Whether or not the premises in controversy are necessary for those purposes, it is not material to inquire; that is a matter between the government and the corporation, and is no concern of the defendants. It would lead to infinite inconveniences and embarrassments, if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the

purposes of their incorporation, and the title made to rest upon the existence of that necessity."¹

In *National Bank v. Matthews*,² Justice Swayne, delivering the opinion of the court, said: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding for that purpose."

If property is conveyed to a corporation upon an active trust, which cannot be enforced because the performance of the trust would be in violation of the company's charter, the title to the property may nevertheless pass to the corporation, and a resulting trust arise; in such case, a court of equity may be called upon to substitute a new trustee, or to grant such other relief as is equitable.³

§ 711. *Conveyances by a Corporation.* — The same rule applies to a conveyance of property made by a corporation in excess of its charter, provided the corporation is chargeable upon the principles of the law of agency.⁴ In *Railroad Company v. Howard*,⁵ the Supreme Court of the United States held, that, after a sale made by a railroad company to satisfy its creditors had been carried into effect, with the consent or subsequent ratification of all the parties interested in the

¹ *Natoma Water, &c. Co. v. Lewis*, 53 Iowa, 101. Compare *Coleman v. Clarkin*, 14 Cal. 552; *Cowell v. Springs Co.*, 100 U. S. 55, 60; 49 Cal. 517.

Christian Union v. Yount, 101 U. S. 356; *Southern Pacific R. R. Co. v. U. S.* 621, 628, and cases cited; *Orton*, 6 Sawy. 157, and cases cited; *Mapes v. Scott*, 94 Ill. 379; *Alexander v. Tolleston Club*, 110 Ill. 65. Compare *Smith v. Sheeley*, 12 Chambers v. St. Louis, 29 Mo. 576; Wall. 358.

McIndoe v. St. Louis, 10 Mo. 576; *Vidal v. Girard's Exrs.*, 2 How. 188; *De Camp v. Dobbins*, 29 N. J. 7 Pa. St. 233, 240; *Kelly v. People's Eq.* 86, 40-42.

Transportation Co., 3 Oreg. 189, 195; *Morgan v. Donovan*, 58 Ala. 37 Cal. 544; *Darst v. Gale*, 83 Ill. 241, 255; *The Banks v. Poitiaux*, 3 136. See *Smith v. Sheeley*, 12 Wall. 358.

Rand. (Va.) 136; *Barrow v. Nashville, &c. Turnpike Co.*, 9 Humph. 304; *Chicago, &c. R. R. Co. v. 393.*

property sold, the sale could not be impeached merely because the company had no authority to make it in a corporate capacity. So, if a corporation actually consents to the execution of a mortgage upon its property, it cannot afterwards repudiate the mortgage on the ground that the execution of the mortgage was unauthorized.¹

§ 712. *Transfers of Personal Property.* — The same principles apply to unauthorized transfers of personal property by corporations or to corporations. In *Edwards v. Fairbanks*,² the Supreme Court of Louisiana said: "If the company did anything contrary to law, the result might be a forfeiture of its charter. But we do not understand the law to be, that, if a corporation acquires property in a manner even prohibited by law, the property thus acquired still belongs to the vendor who has received the price, and that it can be seized by his creditors to pay his debts." A similar rule was laid down in *Parish v. Wheeler*. Comstock, C. J., delivering the opinion of the court, said: "In my judgment, when a sale of a chattel made to a corporation is executed and complete in all things except the performance of its own promise to pay the price, a plea that it ought not to have made the purchase is not to be entertained, especially so long as it retains and insists upon retaining, all the benefit of the contract."³

The same rule applies to a transfer of negotiable paper,

¹ *Dimpfel v. Ohio, &c. Ry. Co.*, *supra*, § 693. Compare *Great Eastern Ry. Co. v. Turner*, L. R. 8 Ch. 149. 9 Biss. 127; *Silver Lake Bank v. North*, 4 Johns. Ch. 373; *Union Water Co. v. Murphy's Flat, &c. Co.*, 22 Cal. 620; *Southern Life Ins., &c. Co. v. Lanier*, 5 Fla. 110; *Third Avenue Sav. Bank v. Dimock*, 24 N. J. Eq. 26; *Darst v. Gale*, 83 Ill. 136. See *National Bank v. Matthews*, 98 U. S. 628.

² *Edwards v. Fairbanks*, 27 La. Ann. 449, 450; *St. Louis Stoneware Co. v. Partridge*, 8 Mo. App. 217.

³ *Parish v. Wheeler*, 22 N. Y. 494, 506; *Rutland, &c. R. R. Co. v. Proctor*, 29 Vt. 93. See also cases

In *Rutland, &c. R. R. Co. v. Proctor*, 29 Vt. 93, a railroad company, having purchased property which it had no authority to purchase, afterwards sold it, and then sued the purchaser for the price. It was held that the purchaser could not refuse to pay for the property on the ground that the purchase by the railroad company was unauthorized, although the stockholders of the company and the State might have objected to the purchase when made.

either by a corporation or to a corporation. The validity of such transfer cannot be successfully assailed on the sole ground that the execution of the transfer, or its acceptance, involved an unauthorized exercise of corporate power on the part of the company.¹ In *National Pemberton Bank v. Porter*,² the Supreme Court of Massachusetts held, that a national bank which had purchased a promissory note from an indorsee might maintain an action thereon in its own name against a prior indorser, without regard to the question whether the purchase was one which the company was authorized by law to make.

§ 718. **Expressly prohibited Transfers.** — There are many instances in which conveyances and transfers of property made by or to corporations have been given effect, although made in violation of prohibitions contained in general statutes or the charters of the companies themselves.³

G.

§ 714. **Obligations resulting from the Performance of Void Contracts. — General Principles.** — A person who has had the use and benefit of property belonging to another person is not liable to the owner for the value of the property, if it was not taken wrongfully, or in pursuance of an express or implied agreement to make compensation. Under these circumstances, however, the owner of the property may reclaim it *in specie*, unless it was given and received as a gift; and he may recover the proceeds of the property, if it has been

¹ *Ehrman v. Union Central Ins. Co.*, 85 Ohio St. 324; *St. Joseph Firé, &c. Ins. Co. v. Hauck*, 71 Mo. 465; *State of Indiana v. Woram*, 6 Hill, 37.

² *National Pemberton Bank v. Porter*, 125 Mass. 338. See also *First Nat. Bank v. Gillilan*, 72 Mo. 77; *Thornton v. National Exchange Bank*, 71 Mo. 221; *Franklin Avenue Savings Inst. v. Board of Education*, 75 Mo. 408.

To the contrary, see *Farmers', &c.*

Bank v. Baldwin, 23 Minn. 198, and *First Nat. Bank v. Pierson*, 24 Minn. 140. These cases were distinguished in *National Pemberton Bank v. Porter*, on the ground that in Minnesota only the *real owner* of a note can sue on it, while in Massachusetts any holder of negotiable paper, though not in fact or in law the owner, can sue with the consent of the owner.

³ See *supra*, §§ 673, 678.

converted into a fund of money. Thus, if anything of value is given by one party to another under an attempted agreement, which was not consummated for want of the necessary mutual assent, or by reason of the want of authority of an agent assuming to represent one of the parties, an action may be maintained, without reference to the agreement, to recover the thing transferred, or, if it was converted, whatever may be equitably due for the value received. The same rule would apply if the agreement had been consummated, but was not legally binding by reason of some prohibition of the law, unless the transaction was so immoral that the courts must, for reasons of public policy, decline to grant a remedy.

A distinction should be noted between those cases where a party voluntarily accepts benefits from another, and those cases where the benefits are received involuntarily. In the former case, the law raises an obligation to pay whatever is equitably due for the value received;¹ but in the latter case there is no liability except to give up the specific things received or the fund into which they have been converted, if either can be restored; a person cannot be made to pay for what is thrust upon him without his consent.

These doctrines apply in determining the rights and liabilities of corporations, as well as of individuals.²

¹ See *infra*, § 723.

² See cases cited in the following sections.

In Brice on *Ultra Vires* (2d Eng. ed. 769), it is laid down that "in every case a corporation must account for benefits which it has received under an *ultra vires* transaction. This is a well-known equitable doctrine. It has been applied not only to persons of full age, and under no disability civil or mental, but also to those who are under some incapacity, — to infants and to lunatics. From these persons the principle has been extended to corporations." It is also stated that

"persons who have obtained, at the expense of corporations, benefit by means of *ultra vires* transactions, are liable to repay to the extent of the benefit so derived." Ibid. 814. See *per* Gifford, L. J., in *Re National, &c. Building Soc.*, L. R. 5 Ch. 809, quoted *infra*, § 716, *n*. The conclusions here stated, when properly understood, are undoubtedly correct. But the statement that the principle has been extended to corporations from infants and lunatics is probably inaccurate. In any event, the cases are analogous only to a limited extent.

§ 715. *Liability of a Corporation for Money or other Property received under a Contract which is void because in Excess of the Powers of its Agents.* — If money or other property is given to a corporation under a contract which is void because the agent assuming to represent the corporation in the transaction had no authority to bind it, the corporation is liable to account for the money or other property so received. If any portion of the property has been preserved, it must be restored to the owner, and if it has been converted into a distinct fund, this must be given up. The corporation must also pay the value of anything which has been applied to its *legitimate* purposes.¹ But its liability extends no further. It cannot be charged upon the abortive contract, nor can it be compelled to pay for anything received by its agents without authority unless subsequently applied to some authorized use. The liability of a corporation, in certain cases, to make compensation for what it has received under an abortive contract is not, as is often stated, a liability to pay for *the benefits* received. A corporation may have obtained important benefits under an attempted contract, and yet be under no obligation to pay for them.² The obligation is only to yield up to the owner such property or funds as remain in its possession, and to pay for anything which its agents have rightfully applied to its uses.

Thus, in *Burges and Stock's Case*,³ the directors of a life assurance company had issued policies of marine insurance, and applied the premiums to the use of the company. Upon winding up the company, the holders of the policies were held not to be entitled to prove for losses, but were allowed the amount of the premiums paid. Vice-Chancellor Page-Wood said: "They had no consideration for the premiums

¹ *New Castle, &c. R. R. Co. v. v. Norton*, 9 Jur. n. s. 1308; *Wood Simpson*, 23 Fed. Rep. 214. & *Brown's Case*, 10 W. R. 662;

² See, for example, *Davis v. Key's Case*, 16 W. R. 1108; *Athe- Old Colony R. R. Co.*, 181 Mass. nseum Life Ass. Soc. v. *Pooley*, 8 De G. & J. 294, 300; *Re London*, 258.

³ *Burges & Stock's Case*, 2 J. & H. 441, 448; and cases *supra*, 377.

§ 112. See also *British Prov. Soc.*

they paid. The directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered, even at law, as money had and received. The proof must therefore be allowed for the amount of the premiums paid."

§ 716. **Liability for Borrowed Money.**—A corporation cannot be charged with a loan of money made by its directors without authority; but if any portion of the money was applied to the proper uses of the company, it may be held liable to that extent at least. The liability of the company does not, in such case, arise from the contract entered into by the directors, but from the equitable right of the lender to recover his money, which has gone to swell the company's assets.¹ Upon the same ground, it follows that, if money borrowed by the agents of a corporation without authority has been used to satisfy valid claims existing against the company, the lender will be entitled to stand in the place of such paid-off creditors to the extent that his money has gone to pay off their claims.

*Re German Mining Company*² is a leading authority upon this point. It was there decided that the directors of a joint-stock mining company, and individual shareholders who had advanced money which was used to meet expenses properly incurred in managing the company's business and to pay off just obligations, were entitled to be reimbursed the amount advanced, although they had no authority to borrow on behalf of the company.

¹ *Manville v. Belden Mining Co.*, Johns. V. C. 690; *Lowndes v. Garrett, & Co. Mining Co.*, 33 L. J. Ch. 418; 2 J. & H. 282; *Ulster Ry. Co. v. Banbridge, & Co. Ry. Co.*, Ir. R. 2 Eq. 607; and see cases below.

² 4 De G., M. & G. 19, 41. As to the facts of the case, see *supra*, § 344. To similar effect, see *Re Norwich Yarn Co.*, 22 Beav. 148, 167; *Hoare's Case*, 30 Beav. 225; *Re Magdalena Steam Nav. Co.*, 55 Compare Bank of Australasia v. Breillat, 6 Moo. P. C. 152; *Scott v. Colburn*, 26 Beav. 276; *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 198.

In *Troup's Case*,¹ Sir John Romilly, M. R., laid down the rule, "that, where the directors of a company have no power to borrow money, the repayment of money cannot be enforced by the lender against the company; yet, if the money has been *bona fide* applied to the purposes of the company, the *bona fide* lender is entitled to payment as against the company."

In *Re Cork and Youghal Railway Co.*,² money had been raised by the directors of a corporation by an unauthorized issue of bonds. Lord Hatherley said: "The money having been *de facto* so applied to the legitimate purposes of the company, is it possible that the company should be allowed to derive the benefit of all the expenditure which has been thus incurred, and claim the surplus for the benefit of the shareholders? Can the shareholders be allowed to say to the bondholders, 'It is true that the debts have been cleared off by means of your money, but you are not the persons who have cleared them off; and you are not to receive the benefit of it, for we are to receive the benefit'? The proper course to be taken seems to be this: that so far as the company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off."³

¹ *Troup's Case*, 29 Beav. 858, 356.

² *Re Cork & Youghal Ry. Co.*, L. R. 4 Ch. 748, 760, 761.

³ In *Re National, &c. Building Soc.*, L. R. 5 Ch. 809, 818, Gifford, L. J., referring to the above cases, said: "They were decided upon a principle recognized in old cases, beginning with *Marlow v. Pitfield*, 1 P. Wms. 558, where there was a loan to an infant, and the money was spent in paying for necessities,

and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were actually necessary for the lunatic. In such cases, it has been held that, although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose

§ 717. *When the Corporation is not Liable.* — In considering the application of this doctrine, it must be borne in mind that *prima facie* a corporation is not liable for money borrowed by its directors without authority. It can be charged in such case only provided it be shown affirmatively that the money has been appropriated by the company. There is no estoppel in a case of this kind: the money must have been appropriated by the company, either with the consent of all the shareholders, or through the company's agents, while acting within the authority conferred upon them. If the company's agents have used the money for unauthorized purposes, though the company may have been benefited thereby, it cannot be charged. A corporation cannot be held liable merely because it has had the benefit of money which has been applied to its use without its express or implied consent.¹

§ 718. *Liability of Municipalities.* — The relation between a municipality and the officers appointed or elected for its government is not merely that of principal and agent. The officers of a municipality are public officials, having certain governmental powers; and these powers are not delegated by the municipality, but are derived from the legislature of the State. It follows, therefore, that the doctrine of ratification and acquiescence cannot, as a rule, be invoked so as to legalize or render binding contracts made by the officers of a municipality in excess of their authority. Nor is it material that such contracts have been performed by one of the parties. But municipalities as well as private corporations must account for money or other property applied by their officers

debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, which ought not to be departed from."

¹ See Worcester Corn Exch. Co.'s Case, 3 De G., M. & G. 180; *Ex parte* Cropper, 1 De G., M. & G. 147; *Re* Kent Benefit Building Society, 1 Dr. & Sm. 417; *Re* Na-

tional, &c. Building Society, *Ex parte* Williamson, L. R. 5 Ch. 809; *Re* Victoria, &c. Building Society, L. R. 9 Eq. 605; *Hawtayne v. Bourne*, 7 M. & W. 595; *Zottman v. San Francisco*, 20 Cal. 96; *Murphy v. City of Louisville*, 9 Bush, 189; *Second Avenue R. R. Co. v. Mehrbach*, 49 N. Y. Super. Ct. 267. *Supra*, § 714.

to authorized uses, although the money or property so applied was received under an agreement which is wholly void.

This was decided by the Supreme Court of the United States in *Hitchcock v. Galveston*.¹ The Mayor and Council of the city of Galveston had entered into a contract with the plaintiff to issue certain bonds of the city, payable at a future day, in payment for the paving of certain streets. After a portion of the work had been performed, the Mayor and Council declared the contract to be null and void, and notified the plaintiff to that effect. The plaintiff thereupon brought suit to recover damages for the breach of the contract. Upon demurrer to the petition the Circuit Court rendered judgment for the defendant, for the reason that the city had no power to issue the bonds agreed upon. This ruling was reversed by the Supreme Court. Mr. Justice Strong, delivering the opinion, said: "If it were conceded that the city had no lawful authority to issue the bonds described in the ordinance and mentioned in the contract, it does not follow that the contract was wholly illegal and void, or that the plaintiffs have no rights under it. They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work as well as assume liabilities; that the city has received and now enjoys the benefits of what they have done and furnished; that for these things the city promised to pay; and that, after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds

¹ 96 U. S. 350, 351. See also *Gas Light, &c. Co.*, 98 Ill. 415. *Allegheny City v. McClurkan*, 14 Pa. St. 83; *Argenti v. San Francisco*, 16 Cal. 255, 265; *Maher v. City of Chicago*, 38 Ill. 266; *City of East St. Louis v. East St. Louis* Compare, however, *Zottman v. San Francisco*, 20 Cal. 96; *City of Natchez v. Mallery*, 54 Miss. 499; and see *supra*, § 621.

because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful."

Upon a similar principle, it has been held that, although negotiable bonds issued by the officers of a municipality in its name are not binding upon the municipality if issued without authority, yet if the money received from the purchasers of the bonds was received and applied by the officers of the municipality for an authorized purpose, an action will lie against the municipality for the money so had and received to its use; and if the original purchaser of the bonds has transferred them to subsequent holders, the latter may recover as assignees of the original holders' claim.¹

§ 719. *The Right of a Corporation to recover Compensation where its Property has been transferred under a Void Agreement.* — If any property belonging to a corporation is transferred under an agreement which is legally void, or which was never consummated, the corporation may compel the transferee to yield up what he has so received.² In many instances, the corporation would be entitled to additional relief. Thus, if the party who received the property voluntarily applied it to his own use, he would be liable to the corporation for the value of the property so applied, because the law would raise an obligation to pay for the same.³

Money belonging to a corporation and received from its

¹ *Gause v. City of Clarksville*, 1 McCrary, 78.

² *Hardy v. Metropolitan Land, &c. Co.*, L. R. 7 Ch. 427; *Ernest v. Croysdill*, 2 De G., F. & J. 175; *Bryson v. Warwick, &c. Canal Co.*, 1 Sm. & G. 447; 4 De G., M. & G. 711; *Zulueta's Claim*, L. R. 5 Ch. 444; *Parker v. McKenna*, L. R. 10 Ch. 96; *In re Canadian Oil Works Co.*, *Hay's Case*, L. R. 10 Ch. 598.

³ A corporation would be equally liable to pay for property received under a void contract, if it was ap-

plied to the use of the company with its consent; that is, with the consent of all the shareholders, or of an agent duly authorized. But a corporation cannot be compelled to pay for property received by its agents without authority, and applied to its use without authority, the rights of no innocent party being involved. Under these circumstances, the corporation can only be compelled to yield up the property or its proceeds. See *supra*, § 714.

agents under a void agreement may, therefore, usually be recovered as so much money had and received.¹ Upon the same principle, it has been held that, where the property of a railroad company is taken and used under a lease which is void because executed by the company's officers without obtaining the consent of the shareholders, as required by the law under which the company was organized, the company is entitled to recover from the lessee just compensation for the use of the property without regard to the lease.²

§ 720. If the delivery of the property was unauthorized, and wrongful as against the corporation and its shareholders, and the party receiving the property had notice of the wrong, he would be liable to the corporation for the loss sustained by it, or at least for the full value of the property misappropriated. This would clearly be the rule where property or funds belonging to a corporation are transferred by its agents, or used under an agreement which is in excess of the company's charter, and therefore void. Every person dealing with the agents of a corporation is bound to take notice of the company's charter; and it is settled that no agent of a corporation has authority to enter into a contract which is in excess of the charter, or to execute a void contract. A person who receives property or funds of a corporation from the company's agents, under a contract which he knew or ought to have known to be in excess of the company's charter and void, may therefore be charged by the corporation as a joint wrong-doer with its agents.³ Under these circumstances, if the agents of the corporation refuse to institute proceedings in the name of the corporation to recover the property or funds misapplied, the shareholders may sue on its behalf to protect their equitable interests; and if a receiver or official representative has been appointed, the latter may sue on behalf of all the parties interested.⁴

¹ *Harriman v. First Bryan, & Co.* Church, 68 Ga. 186; *Pierson v. McCurdy*, 38 Hun, 520.

² *Farmers' Loan & Trust Co. v. St. Joseph, & Co. R. R. Co.*, 1 McCrary, 247.

³ *Zulueta's Claim*, L. R. 5 Ch. 444; *Hardy v. Metropolitan Land, & Co.*, L. R. 7 Ch. 427.

⁴ See *supra*, Chapter V.

§ 721. Liability to account for Anything received under an Agreement which is Void because prohibited by Law. — The general rule is, that, if an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party and has failed to perform the agreement on his part must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case.¹ And if one of the parties to a prohibited and void agreement is innocent of any wrong, the courts will always compel the guilty party to account for whatever he has received under the agreement.

Actual performance by a party to an illegal agreement of the obligations stipulated for by the other party, is of course a sufficient accounting for the consideration received from such party. The party seeking to recover irrespective of the void agreement can only recover what is equitably due.

These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations although prohibited by statute or by the common law; and, although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received.²

¹ The courts can, of course, grant no relief if the statute expressly says that they shall not. It is sometimes said to be a maxim, *In pari delicto melior est conditio possidentis*. The word *delicto* in this instance, however, means something more than mere illegality. It is difficult to define what constitutes such immorality as will cause the courts not only to declare a contract legally void, but to refuse all relief to the parties irrespective of the contract.

The decisions indicate that the matter rests largely in the discretion of the court in each particular case.

² *White v. Franklin Bank*, 22 Pick. 181; *Dill v. Wareham*, 7 Metc. (Mass.) 438; *Episcopal Society v. Episcopal Church*, 1 Pick. 373; *Whitney v. Peay*, 24 Ark. 22; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Foulke v. San Diego, &c. R. R. Co.*, 51 Cal. 365; *Farmers' Loan & Trust Co. v. St. Joseph, &c. R. R. Co.*, 1 McCrary, 247; *Madi-*

Thus although negotiable paper discounted by a corporation, in violation of the law of New York restraining unauthorized banking, cannot be enforced by the corporation, the money advanced on such discount may be recovered.¹

So where the charter or general laws governing a corporation provide that its contracts shall not be binding unless made in a particular form, a suit may nevertheless be maintained to recover the value actually received under a contract which is rendered void by the statute.²

§ 722. **Money paid may be recovered.** — If one of the parties to a contract which is void for illegality pays money to the other party in part performance of the contract, and the contract is then abandoned before it has been performed on the other side, the party who so advanced his money is entitled to recover the same, unless the transaction was positively immoral. This was the decision in *Spring Company v. Knowlton*.³ The directors of the corporation which was sued in that case had resolved to increase the amount of its capital stock, and the plaintiff had subscribed for a portion of the new issue of shares, and paid a part of the amount of his subscription. Before any certificate had been issued by the corporation, the plan of increasing the company's capital stock was abandoned, it being illegal and fraudulent. It was held that, although the plaintiff had been a party to the fraudulent and illegal plan of increasing

son Ave. Baptist Church v. Baptist Church, 78 N. Y. 82; *Tracy v. Talmage*, 14 N. Y. 162, 191; *Curtis v. Leavitt*, 15 N. Y. 14, 15, 95; *Sackett's Harbor Bank v. Codd*, 18 N. Y. 240; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490, 496; *Vanatta v. State Bank*, 9 Ohio St. 27; *United States Express Co. v. Lucas*, 36 Ind. 361. See *In re Cork, &c. Ry. Co.*, L. R. 4 Ch. 748.

¹ *Pratt v. Short*, 79 N. Y. 487; *Pratt v. Eaton*, 79 N. Y. 449, reversing 18 Hun, 293; and see *supra*, § 670.

² *Foulke v. San Diego, &c. R. R. Co.*, 51 Cal. 865. A provision of this character would, however, in most instances, be construed as a regulation for the internal government of the corporation, (see *supra*, § 675,) and the informality of a contract would merely raise a question of agency.

³ *Spring Co. v. Knowlton*, 103 U. S. 49, affirming *Knowlton v. Congress, &c. Spring Co.*, 14 Blatchf. 364. *Contra, Knowlton v. Congress, &c. Spring Co.*, 57 N. Y. 518.

the stock, he was entitled to recover the money he had paid on his subscription.¹

§ 723. **Cases where there is no Liability of any Character.** — In some instances a party to an agreement which is legally void may have the full benefit of performance of the agreement by the other party, without incurring any legal liability either to make compensation for a breach of the agreement, or to account for the consideration received. Thus the courts will grant no relief of any kind to a party who has performed a legally void agreement, if the agreement is positively immoral, or there are reasons of public policy or an express statutory prohibition preventing the courts from interfering between the parties.²

There are also certain cases in which the law imposes no obligation to make compensation for benefits received, however valuable they may have been, unless there was a valid contract to pay for them. Property or funds received under a void agreement, or their proceeds, if they can be traced, must undoubtedly be yielded up to the owner. So, in certain cases, the law imposes an obligation to make compensation for a benefit received, although there was no express or implied agreement to pay for it; as, for example, where money or any tangible property is received and appropriated by a party, or where money is paid under legal compulsion for the use of another. In these cases a *debt* is created by operation of law. If, however, the benefit received is not of such a character as to give rise to a technical debt which could be recovered at common law under an *indebitatus* count, and there is no equitable relation between the parties giving rise to an equitable obligation, the party receiving the benefit cannot be compelled to pay for it unless he agreed to do so.³

¹ See also *New Castle, &c. Ry. v. Simpson*, 21 Fed. Rep. 533; *Vanatta v. State Bank*, 9 Ohio St. 27; *White v. Franklin Bank*, 22 Pick. 181; *Dill v. Wareham*, 7 Metc. (Mass.) 438. *In pari delicto potior est conditio defendentis*, or *ex dolo malo non oritur actio*. See Pollock's Principles of Contracts; *Holman v. Johnson*, Cowp. 341, 343, *per Lord Mansfield*.

² This doctrine is commonly stated in the form of the maxim,

³ See Langdell's Summary of Contracts, §§ 90-98.

*Davis v. Old Colony Railroad Co.*¹ was a suit against a railroad company whose officers had executed a contract guaranteeing the payment of the expenses of a musical festival, in the expectation that it would be of pecuniary benefit to the company by increasing its proper business. An action having been brought on this agreement, the Supreme Court of Massachusetts held that the contract was unauthorized, and that, as nothing in money or property had been received by the corporation, it could not be charged with liability.

*Thomas v. Railroad Co.*² is another case in which the defendant was not liable, either under the contract which had been acted upon, or irrespective of the contract. A railroad company had executed a lease of its railroad property for twenty years, with the condition that it should have the right to terminate the lease at any time on paying the lessee the value of the unexpired term, to be determined by arbitrators. After the parties had acted under the lease for five years, the railroad company resumed possession of the property, and refused to pay the value of the unexpired term. An action of covenant having been brought *for the refusal to arbitrate*, the court held that the contract was void because depriving the company of the power of performing its obligations to the public, and that the plaintiff could not recover.

§ 724. *Property acquired on Joint Account under Illegal Contracts.* — If the parties to a contract which is illegal and void have acquired property in pursuance of the contract, the courts will not refuse to adjudicate the equitable rights of the parties to the property so acquired.³ Thus it was held, that, although certain leases of telegraph lines executed by the Union Pacific Railway Company to various telegraph companies were contrary to public policy and void, because in violation of the duties assumed by the railway company to the public, yet as the contract had been acted upon by the

¹ *Davis v. Old Colony R. R. Co.*, 181 Mass. 258. The agreement in this case was void, because the agents of the companies exceeded their powers.

² 101 U. S. 71.

³ See *Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 Wall. 483; *Cook v. Sherman*, 20 Fed. Rep. 167.

parties, and new property added by the telegraph companies to the lines which they had received, the railway company could not take back the lines until an adjustment had been made between the parties according to the equities of the case. McCrary, J., said: "Even if we assume that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract."¹

The learned judge also held that the railway company ought not to be permitted to disregard the contracts, and take back its property without giving up what it had received under the contracts, or making just compensation to the other party.

H.

§ 725. *The Liability of a Corporation for Torts. — The General Rule.* — It was at one time thought impossible that a corporation could be liable for a tort, and particularly for a tort involving the malicious intention of the offender. It was argued that a corporation is an invisible, intangible, and soulless being, and therefore cannot, in the nature of things, be guilty of a wrong. But this opinion was based upon a misconception of expressions used in a purely figurative sense, and is now wholly obsolete.

It must be borne in mind that a corporation is but an association of individuals, like a partnership, and that the only radical distinction between a corporation and a copartnership arises from the fact that an incorporated association is recognized by law as an aggregate body, acting in one name. There is certainly no reason, founded on principle, why a corpora-

¹ *Western Union Tel. Co. v. Union Pacific Ry. Co.*, 1 McCrary, *Union Pacific Ry. Co.*, 1 McCrary, 541; *Western Union Tel. Co. v. 562*; *American Union Tel. Co. v. Burlington, &c. Ry. Co.*, 3 McCrary, *Union Pacific Ry. Co.*, 1 McCrary, Crary, 180. 188; *Atlantic, &c. Tel. Co. v.*

tion should not be charged with the torts of its agents, to the same extent as an individual, or a copartnership, or other voluntary association, under similar circumstances.

§ 726. Every tort committed by a corporation necessarily involves an unauthorized exercise of corporate power; but that is no reason why the company should not be held liable for the consequences. If an association is guilty of a wrong, it seems very clear that the fact that the association committed the wrong in a manner prohibited by law should not deprive the injured party of relief. Accordingly, it is settled that a corporation cannot set up as a defence in an action for the wrongful invasion of another's rights, that authority was not conferred by the charter to do the act complained of, in a corporate capacity. Mr. Justice Swayne said: "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are liable for the acts of their servants, while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offences may be such as will forfeit its existence."¹

¹ National Bank v. Graham, 100 U. S. 699, 702. To the same effect, see Baltimore, &c. R. R. Co. v. Fifth Baptist Church, 108 U. S. 817, 380; Philadelphia, &c. R. R. Co. v. Quigley, 21 How. 210; Merchants' Bank v. State Bank, 10 Wall. 604, 645; New York, &c. R. R. Co. v. Schuyler, 34 N. Y. 80, 49, 50; State v. Morris, &c. R. R. Co., 23 N. J. Law, 367; Brokaw v. New Jersey R. R., &c. Co., 32 N. J. Law, 328; Ramsden v. Boston, &c. R. R. Co., 104 Mass. 120; Peebles v. Patapsco Guano Co., 77 N. Car. 283; Chicago, &c. R. R. Co. v. Davis, 86 Ill. 20; Vinas v. Merchants', &c. Ins. Co., 27 La. Ann. 367; Hays v. Houston, &c. R. R. Co., 46 Tex. 272; Western Union Tel. Co. v.

§ 727. *Illustrations.*—In accordance with the rule above stated, it is now settled that a corporation may be held liable for damages caused by the deceit or false representations of its agents.¹ A corporation may also be held responsible for a libel or slander published by its authority;² for an assault and battery or a false imprisonment;³ for knowingly keeping a mischievous animal;⁴ for a vexatious civil suit;⁵ and for a malicious prosecution.⁶

Eyser, 2 Col. 141; *Ranger v. Great Western Ry. Co.*, 5 H. L. C. 86; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Fishkill Savings Inst. v. National Bank*, 80 N. Y. 162; *South & North Alabama R. R. Co. v. Chappell*, 61 Ala. 527.

¹ *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; *National Exchange Co. v. Drew*, 2 Macq. App. Cas. 103, 124 *et seq.*; *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 72; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Kennedy v. Panama, &c. Mail Co.*, L. R. 2 Q. B. 589; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; *Peebles v. Patapasco Guano Co.*, 77 N. Car. 233; *Lamm v. Port Deposit, &c. Ass.*, 49 Md. 233; *Cragie v. Hadley*, 99 N. Y. 131; *New York, &c. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Butler v. Watkins*, 13 Wall. 456; *Candy v. Globe Rubber Co.*, 37 N. J. Eq. 175; *Fogg v. Griffin*, 2 Allen, 1. *Compare Western Bank v. Addie*, L. R. 1 H. L. Sc. 145, 157.

² *Philadelphia, &c. R. R. Co. v. Quigley*, 21 How. 202; *Samuels v. Evening Mail Co.*, 75 N. Y. 604, reversing s. c. 9 Hun, 288; *Howe Machine Co. v. Souder*, 58 Ga. 64; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; 47 Cal. 207; *Johnson v. St. Louis, &c. Co.*, 2 Mo. App. 565; *Boogher v. Life Ass.*, 75 Mo. 319; *Payne v. Western, &c. R. R. Co.*, 13 Lea (Tenn.), 507;

Van Aernam v. McCune, 82 Hun, 316; *Evening Journal Ass. v. McDermott*, 44 N. J. Law, 430; *Aldrich v. Press Printing Co.*, 9 Minn. 133; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; *Vinas v. Merchants', &c. Ins. Co.*, 27 La. Ann. 367; *Whitfield v. Southeastern Ry. Co.*, El., Bl. & El. 115; *Tench v. Great Western Ry. Co.*, 32 U. C. Q. B. 452.

³ *Hewett v. Swift*, 3 Allen, 420; *Ramsden v. Boston, &c. R. R. Co.*, 104 Mass. 117; *Frost v. Domestic Sewing Machine Co.*, 133 Mass. 563; *Jackson v. Second Ave. R. R. Co.*, 47 N. Y. 274; *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. St. 365; *Chicago, &c. Ry. Co. v. Williams*, 55 Ill. 185; *St. Louis, &c. R. R. Co. v. Dalby*, 19 Ill. 353; *Owsley v. Montgomery, &c. R. R. Co.*, 37 Ala. 560; *Philadelphia, &c. R. R. Co. v. Derby*, 14 How. 468; *American Express Co. v. Patterson*, 73 Ind. 490; *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77.

⁴ *Stiles v. Cardiff, &c. Nav. Co.*, 38 L. J. Q. B. 810.

⁵ *Goodspeed v. East Haddam Bank*, 22 Conn. 530.

⁶ *Vance v. Erie Ry. Co.*, 32 N. J. Law, 334; *Ricord v. Central Pacific R. R. Co.*, 15 Nev. 167; *Reed v. Home Savings Bank*, 130 Mass. 443; *Morton v. Metropolitan Life Ins. Co.*, 34 Hun, 366, *Jordan v. Ala-*

The liability of a corporation for an infringement of the property rights of others is well settled. A corporation may be charged with any wrong which can be committed through an agent.¹

§ 728. **The Liability of a Corporation to pay Exemplary Damages.** — It is an anomaly in the law, that exemplary or punitive damages are allowed in a purely civil suit. The common law enables a plaintiff to recover full compensation for an injury he has suffered; whatever is given in addition to this is a gift, not compensation or damages. Exemplary damages must therefore be considered a penalty or punishment inflicted upon the defendant, for the public good; the fine, however, being given by way of gratuity to the person upon whom the tort was committed, instead of being recoverable by the people in a criminal prosecution.

It would seem to follow that punitive damages should not be inflicted except for an actual wrong, — a malfeasance or a neglect; and, consequently, that a corporation which was guilty of no fault or neglect in selecting its agents should not be compelled to pay a penalty for a malicious act committed without its consent or knowledge. In such case the innocent shareholders should not be punished, besides being compelled to make compensation for a wrong committed by another person.²

bama, &c. R. R. Co., 74 Ala. 85, overruling *Owsley v. Montgomery*, &c. R. R. Co., 37 Ala. 560; *Boogher v. Life Ass.*, 75 Mo. 819, overruling *Gillett v. Missouri Valley R. R. Co.*, 55 Mo. 815; *Copley v. Grover, &c. Machine Co.*, 2 Woods, 494; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Wheless v. Second National Bank*, 1 Baxter (Tenn.), 469; *Carter v. Howe Machine Co.*, 7 Reporter, 621; s. c. 51 Md. 290; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 7; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Williams v. Planters' Ins. Co.*, 57 Miss. 759. *Contra*, *Stevens v. Midland*

Counties Ry. Co., 10 Exch. 352; *Henderson v. Midland Ry. Co.*, 20 W. R. 23; *Walker v. Southeastern Ry. Co.*, L. R. 5 C. P. 640.

¹ *Fishkill Savings Inst. v. National Bank*, 80 N. Y. 162; *Baltimore, &c. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 330.

² The general rule seems to be, that a principal cannot be made to pay exemplary damages for a wrong committed by his agent, unless the principal was guilty of negligence in appointing an incompetent agent, or has afterwards knowingly ratified the agent's wrong. See *Detroit Daily Post Co. v. McArthur*, 16 Mich.

§ 729. The law has, however, been settled otherwise, by repeated adjudications; and the courts have based their decisions upon "public policy,"—a reason which puts an end to all argument.

Thus, some of the courts go the length of holding that punitive damages may be inflicted upon a corporation for a wrong committed by any of its agents, whenever the agent himself might be charged with damages of that character. In these cases it is said that the jury are entitled to consider the interests of society, besides giving compensation for the private injury of the plaintiff; and that they may inflict a proper punishment upon the corporation on account of the public wrong, in order to make an example which will be a lesson to others.¹

In other cases it is held that a corporation cannot be compelled to pay punitive damages on account of a wrong committed by an inferior agent, unless it be shown that the managing or appointing agents of the company either directed the wrong to be done, or subsequently ratified it; but according to these cases it appears to be unnecessary to show that the shareholders, who are made to bear the punishment, have been at fault in any manner.²

447; *Great Western Ry. Co. v. Miller*, Miss. 200; *Atlantic, &c. Ry. Co. v. 19 Mich.* 305; *Grund v. Van Vleck*, Dunn, 19 Ohio St. 162; *Beale v. 69 Ill.* 478; *The Amiable Nancy*, 3 Railway Co., 1 Dill. 568; *Samuels v. Wheat.* 546; *Partridge v. Brady*, v. *Evening Mail Co.*, 75 N. Y. 604, 9 Hun, 288; *Western Union Tel. Co. v. Eyser*, 2 Col. 141; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304; *Belknap v. Boston, &c. R. R. Co.*, 49 N. H. 358; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202.

¹ See *Nashville, &c. R. R. Co. v. Starnes*, 9 Heisk. 52; *Bass v. Chicago, &c. Ry. Co.*, 42 Wis. 654, and cases cited; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Cleg-horn v. New York, &c. R. R. Co.*, 56 N. Y. 44; *Mendelsohn v. Arnheim, &c. Co.*, 40 Cal. 657; *Turner*

Philadelphia, &c. R. R. Co. v. Larkin, 47 Md. 155; *New Orleans, &c. R. R. Co. v. Hurst*, 36 Miss. 660; *New Orleans, &c. R. R. Co. v. Bailey*, 40 Miss. 395; *New Orleans, &c. R. R. Co. v. Burke*, 53

and cases in the following note.

It is not within the scope of this treatise to discuss the minor variations from these views which have been adopted in the different States; they cannot be said to rest upon any principle peculiar to the law of corporations, or, indeed, upon any principle at all.

§ 730. *When a Corporation is liable for a Tort committed by an Agent.* — In the preceding sections it has been shown that a corporation is liable for the torts of its agents, to the same extent as an individual under similar circumstances; and that the fact that a corporation was not authorized by its charter to commit a tort is no defence in an action by the party injured.

It is a general rule of the law of agency, that a principal is liable for any tort committed by his agent in the performance of the business which he was employed to transact, even though the particular act constituting the tort may have been done without the knowledge of the principal, and in violation of his express directions; but a principal is not responsible for an act performed by his agent while in no manner engaged in performing the business of the principal.

In applying this rule to a corporation or copartnership, it is of course necessary to take into consideration its character and organization. The scope of the authority of the agent who has committed the tort, and the character of the business for which he is employed, must likewise be considered.¹

§ 731. *Ratification of Torts.* — If a corporation has ratified a wrongful act performed by a person professing to act on its behalf, then the company may be held liable for such act, although it could not have been held liable at the time the act was done. The shareholders of a corporation may make

v. North Beach, &c. R. R. Co., 34 Cal. 594; *Hagan v. Providence, &c. R. R. Co.*, 8 R. I. 88; *Ackerson v. Erie Ry. Co.*, 32 N. J. Law, 254; *Perkins v. Missouri, &c. R. R. Co.*, 55 Mo. 201; *Malecek v. Tower Grove, &c. Ry. Co.*, 57 Mo. 17; *Doss v. Missouri, &c. R. R. Co.*, 59 Mo. 27; *Travers v. Kansas Pacific Ry. Co.*, 63 Mo. 421; *Galveston, &c. Ry. Co. v. Donahoe*, 56 Tex. 162. With regard to the rule in actions against municipal corporations, see *Chicago v. Kelly*, 69 Ill. 475; *Chicago v. Jones*, 66 Ill. 349; *Barbour County v. Horn*, 48 Ala. 566.

¹ See for example *Miller v. Burlington, &c. R. R. Co.*, 8 Neb. 219.

the company liable for a tort committed on its behalf, by unanimously ratifying the same. A corporation may also be made responsible for a tort committed on its behalf, by the subsequent ratification of its agents; but the ratifying agents must have authority to bind the corporation by the ratification.¹ The doctrine of estoppel has no application in such case; unless the agents ratifying the act constituting the tort have authority, as between themselves and the corporation, to bind the latter by their ratification, it cannot be held responsible.²

§ 732. *The Liability of a Corporation for Criminal Offences.*

— It is sometimes said that the act of an agent is, in law, the act of his principal; but it is well to bear in mind that this is a mere fiction. A principal is frequently liable for the acts of his agents, as if he had done the acts himself; the reason of the liability, however, is not always the same. Sometimes the principal is chargeable by reason of his previous consent, sometimes by reason of his subsequent adoption of the act of the agent, and sometimes by reason of a rule of positive law established upon grounds of public policy, — which is the ultimate source of all law. It is for the latter reason that a principal may often be held civilly responsible for the torts of his agents, though in no manner at fault himself; and this is true, even where the tort involves a malicious intention on the part of the wrong-doer.³

But public policy certainly does not demand that a person or association should be punished by the State, through criminal proceedings, on account of a wrong committed by another. This would be contrary to the natural sense of justice. Hence it is held that where the commission of a crime involves the intention of the offender, this intention

¹ See *supra*, § 624 *et seq.*

² *Mitchell v. City of Rockland*, 52 Me. 118, 125; *Cumberland, &c. Canal Co. v. Portland*, 62 Me. 508.

Nevertheless, it has been held repeatedly that the managing agents of a corporation may ratify a malicious wrong committed by an infe-

rior agent, and thereby subject the company to the payment of punitive damages. *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202, and cases *supra*, § 728.

³ The justice and expediency of this rule, and its historical origin, cannot be considered here.

cannot be imputed by means of a fiction; actual intention is required.

It follows, therefore, that a corporation cannot be charged criminally with a crime involving malice, or the intention of the offender. Even though the corporators themselves should unanimously join, with malice aforethought, in committing a crime as a corporate act, yet the malice would be that of the several members of the company, and not actually one malicious intention of the whole company.¹

§ 783. There are, however, certain classes of crimes which do not depend upon the intention of the offender, and are not distinguishable from simple torts, except by the fact that in the one case an individual sues for damages on account of a private wrong, and in the other case the State sues for a penalty on account of a public wrong. In these cases the crime consists of the act alone, without regard to the intention with which it was committed; and there is no difficulty in attributing an offence of this character to a corporation, since it may be committed entirely through the company's agents.

Accordingly, it has been held that a corporation may be indicted for causing a public nuisance,² for not performing a duty cast upon it by law,³ or for doing any act which is made indictable, without regard to the intention of the offender.⁴

§ 784. *Liability for Contempt of Court.* — The liability of a corporation for a contempt of court is analogous to its liability

¹ See *Cumberland, &c. Canal Co. v. Portland*, 56 Me. 77; *Androscoggin Water, &c. Co. v. Bethel, &c. Mill Co.*, 64 Me. 441; *United States v. Baltimore, &c. R. R. Co.* (U. S. C. C.), 7 Am. L. Reg. n. s. 757. Compare *State v. Baltimore, &c. R. R. Co.*, 15 W. Va. 362.

² *Commonwealth v. Central Bridge Co.*, 12 Cush. 242; *Mower v. Leicester*, 9 Mass. 247; *Louisville, &c. R. R. Co. v. Commonwealth*, 13 Bush (Ky.), 388; *Boston, &c. R. R. Co. v. State*, 82 N. H. 215; *Regina v. Mayor*, 7 El. & B. 453.

³ *Commonwealth v. New Bedford Bridge Co.*, 2 Gray, 339; *State v. Morris, &c. R. R. Co.*, 23 N. J. Law, 360; *Commonwealth v. Vermont, &c. R. R. Co.*, 4 Gray, 22; *Louisville, &c. R. R. Co. v. State*, 3 Head, 523; *Susquehanna, &c. Turnp. Co. v. People*, 15 Wend. 267; *People v.*

Albany, 11 Wend. 539; *Regina v. Great North, &c. Ry. Co.*, 9 Q. B. 315.

⁴ *Regina v. Bradford Nav. Co.*, 6 B. & S. 631; *State v. Murfreesboro*, 11 Humph. 217; *United States v. Baltimore, &c. R. R. Co.*, 7 Am. L. Reg. n. s. 757; *Brennan v. Tracy*, 2 Mo. App. 540.

for nonfeasance of a statutory duty. A corporation may be compelled to obey the orders of a court of chancery by a *distringas* and sequestration of its property.¹ So, a corporation may be fined for violating an injunction of the court.² There are many kinds of contempt of which a corporation cannot, in the nature of things, be guilty; and even in those cases where a corporation can be held liable, it is probable that the shareholders may protect themselves from loss by applying to the proper court.³

¹ *McKim v. Odom*, 3 Bland's Ch. 420 *et seq.*; *Judson v. Rossie Galena Co.*, 9 Paige, 598; *Reid v. Northwestern R. R. Co.*, 32 Pa. St. 257.

² *Mayor &c. of New York v. New York, &c. Ferry Co.*, 64 N. Y. 622.

³ See *supra*, Chapter V.

CHAPTER IX.

THE LEGAL CONSEQUENCES OF THE FORMATION OF A CORPORATION WITHOUT AUTHORITY OF LAW.

§ 785. **The Contract of Membership.**—It has been pointed out that a private corporation, like a copartnership, is a voluntary association, formed by the mutual agreement of its members. The formation of a corporation, however, is prohibited by the common law, and therefore a corporation, unlike a common copartnership, cannot be formed legally unless authorized by an act of the legislature.¹ It is important, therefore, to determine the legal validity of an unauthorized agreement to form a corporation, as between the associates themselves, before considering the legal validity of the acts of such an association with regard to third parties.

§ 786. **Contract between the Shareholders and Consent of Legislature both necessary.**—It is clear that the legislature of a State has no power to constitute a person a member of a private corporation without his consent, for this would involve the creation of a contractual relation by legislative enactment. Nor can the legislature compel a subscriber for shares in a proposed corporation to accept shares in a different corporation from that which was contemplated when the subscription was made.² It is likewise settled, that a State cannot alter the contract between the shareholders in a corporation by legislative enactment.³

¹ See *supra*, §§ 7, 8.

² *Richmond Factory Ass. v. Clarke*, 61 Me. 351, 358; *Gardner v. Hamilton Mut. Ins. Co.*, 38 N. Y. 421.

³ *Infra*, §§ 1047, 1059. Where the corporation is formed subject to

a provision that the charter may be altered or amended by the legislature, a somewhat different rule applies. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, reversing 15 Hun, 371; and see *infra*, § 1093.

However, if a number of persons have in fact associated as a corporation, and entered into the contract of membership as between themselves, the legislature may subsequently cure any illegality of their agreement.¹ In this case, the legislature does not create the contract of membership of the corporators, but merely removes the prohibition of the law which prevents their actual agreement from having effect.

It is plain that the members of a corporation cannot, by their ratification or acquiescence, render legal the illegality of forming a corporation without complying with the statutory prerequisites.²

§ 737. **Effect of Non-compliance with Conditions Precedent prescribed by Law.** — If a charter or general incorporation law prescribes certain formalities to be complied with by parties wishing to form a corporation under it, the due performance of these formalities is ordinarily a condition precedent to the legal incorporation of the company. No authority to form a corporation can be derived from a charter or law of this nature, until the conditions upon which the authority is offered by the State have been complied with;³ nor do the subscribers to the capital stock of a corporation about to be formed undertake to unite as corporators, except on condition that the requirements of the law shall be fulfilled.⁴

There are therefore two objections against the validity of a contract of membership in a corporation entered into by a subscription for shares made before the organization of the company, if the conditions prescribed by law to a legal incorporation are not subsequently complied with. These are, —

First. That each stock subscriber has offered or agreed to associate with the other subscribers in forming a corporation only on condition that the requirements of the law shall be fulfilled.

Secondly. That a contract made without complying with the law is illegal.

¹ *Workingmen's Building, &c. Assoc. v. Coleman*, 89 Pa. St. 428. See *supra*, § 651.

² *Supra*, § 619.

³ *Supra*, §§ 26-30.

⁴ *Supra*, §§ 67-72. *Coyote, &c. Mining Co. v. Ruble*, 8 Oreg. 284; *De Witt v. Hastings*, 69 N. Y. 518.

§ 738. **Conditions Precedent to the Formation of a Corporation.** — Accordingly, it has been held that a subscription to the capital stock of a corporation about to be formed under a charter or general law does not constitute the subscriber a shareholder until all conditions precedent to the legal incorporation of the company have been fulfilled.

Thus, if an act of incorporation authorizes a corporation to be formed only after a certain number of shares have been subscribed, those persons who subscribe have no authority to form a corporation until the full number of shares has been taken; and for this reason, as well as by virtue of the implied terms of their mutual agreement, the subscribers do not become corporators, and as such liable to contribute their proportionate shares of capital, until the number of subscriptions required by law has been obtained.¹ The same rule applies where the filing of a certificate or any other formality is prescribed by law as a condition precedent to the legal incorporation of the company.² So, where an attempt is made to consolidate two companies pursuant to law, shareholders of the original companies are not bound by the attempted consolidation, unless the forms prescribed by law are complied with.³

§ 739. **Conditions Precedent to the Formation of Contracts of Membership after Incorporation.** — The rule applies equally

¹ *Supra*, § 57.

² *Supra*, §§ 27, 67.

³ *Mansfield, &c. R. R. Co. v. Drinker*, 30 Mich. 124, 127. Mr. Justice Cooley said: "To recognize the plaintiff as a corporation *de facto* does not get over the difficulty which exists in this case. It may be a corporation *de facto*, and entitled as such to enforce contracts as against parties who have dealt with it, without at the same time in any manner having succeeded to the rights of the Ohio & Michigan Railroad Company, with which the contract of the defendant was made. To acquire the rights of that company in the defendant's contract, the plain-

tiff must have obtained it by assignment, or it must show its right by succession under a consolidation. No assignment is relied upon, and the consolidation is not shown to have been perfected. Unless, therefore, the defendant, by some participation as stockholder in the action of the plaintiff corporation, by virtue of his previous relation as stockholder in the Ohio & Michigan Railroad Company, has estopped himself from disputing the consolidation, the conclusion of the circuit judge would seem unquestionable." See also *Peninsular Ry. Co. v. Tharp*, 28 Mich. 506; *Tuttle v. Michigan Air Line R. R. Co.*, 35 Mich. 247.

where particular formalities or conditions precedent are prescribed by law in constituting a person a member of a corporation by a subscription for shares or otherwise; and it is immaterial for this purpose whether the subscription be preliminary to the formation of the corporation, or for new shares in a corporation already in existence. In either case, the right to enter into the contract, and to enjoy the franchises offered by the State, can be assumed legally only provided the conditions prescribed by law have been complied with; and in either case the individual shareholders in the association have agreed to unite with other shareholders only upon similar conditions. Campbell, J., said: "No person can obtain rights of membership in a corporation except in compliance with its charter or governing law, and, if that prescribes any conditions or special methods of becoming a member, the law is imperative. There may be cases of mutual dealing which will estop both parties, but no contract or subscription can be valid if not conforming to the statute."¹

Thus, if a charter of incorporation requires the payment of a deposit upon each share subscribed, as a condition precedent to the validity of subscriptions for shares, a subscription made without paying the required deposit is not binding upon the company nor upon the subscriber; and the invalidity of the subscription may be set up as a defence to an action for calls.²

¹ *Carlisle v. Saginaw Valley, &c. R. R. Co.*, 27 Mich. 815, 818.

² *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169, 172. *Fiser v. Mississippi, &c. R. R. Co.*, 82 Miss. 859; *Charlotte, &c. R. R. Co. v. Blakely*, 8 Strobb. 245; *Wood v. Coosa, &c. R. R. Co.*, 32 Ga. 273-288; and see *supra*, § 71.

In *Boyd v. Peach Bottom Ry. Co.*, *supra*, the court said: "Aside from making the subscription, in the first instance, and afterwards giving his note for the ten per cent when called on by the collector, the plaintiff in error appears

to have been entirely passive. If he had acted as commissioner or director, or participated in stockholders' meeting, or performed any act recognizing his membership of the company, or tending to fasten liability on other subscribers, he should be held to the payment of his subscription, notwithstanding the failure of the commissioners to exact the payment required by law to make it valid and binding; but he appears to have stood aloof, and to have done nothing by which he was estopped from insisting on the technical defence which he has seen

Upon the same principle, it follows that a transfer of shares cannot be validly made, unless the forms of transfer prescribed by the charter or articles of association of the company have been followed.¹

§ 740. **Conditions Precedent to the Liability of the Corporators to pay the Amount of their Shares.** — The subscribers to the stock of a corporation do not, as a rule, become liable to contribute the amount of their subscriptions immediately upon becoming members of the company, but their liability is generally subject to conditions.² And although they may have waived irregularities in the formation of their company, and have become shareholders in a corporation existing *de facto*, but not *de jure*, they cannot on that account be held to have waived the conditions contained in their promise to contribute the amount of their shares to the company's capital.

Thus, in *Swartout v. Michigan Air Line Railroad*,³ suit was brought by the company against a subscriber to recover the amount remaining unpaid upon his shares; and it was held by the court, that, although the defendant could not set up as a defence that the corporation had not been regularly organized, he might refuse to pay upon the ground that the required amount of stock had not been subscribed. Cooley, J., delivering the opinion, said: "Although the plaintiff below was a corporation *de facto*, and entitled to maintain actions as such, it may still be true that it was not authorized to recover upon subscriptions to its corporate stock. For this purpose it is not sufficient that its corporate powers are, under the circumstances, to be taken as conceded by the subscribers. The statute has pointed out certain steps which are to be taken by the corporation, and has made these conditions precedent to its right to enforce the obligations of its members. Performance of these the corporators have a right to insist upon; and the plaintiff was necessitated to show

fit to interpose. Legally he is entitled to the benefit of it." Compare, however, *infra*, § 742.

¹ *Bosanquet v. Shortridge*, 4 Exch. 699.

² *Supra*, §§ 136-143.

³ *Swartout v. Michigan Air Line R. R. Co.*, 24 Mich. 389, 396.

such performance before recovery could have been had in this suit. The first and most important of these is, that subscriptions to a certain amount should be obtained to the capital stock."

§ 741. When a Shareholder cannot avoid his Contract on the Ground that the Formation of the Corporation was unauthorized by Law. — Irregular Subscriptions. — If a person who has subscribed for shares in a corporation, upon the conditions prescribed by law, consents to become a shareholder and to act as a shareholder before these conditions have been complied with, it is clear that he cannot afterwards refuse to perform the obligations of his contract, upon the ground that he never agreed to be bound except upon condition that the requirements of the law should be fulfilled. For, although the conditions upon which the original subscription was made have not been complied with, the subscriber must be held, by reason of his conduct, to have waived these conditions, and to have agreed to become a shareholder in the corporation as actually formed.

It is a different question whether the fact that the contract was unauthorized by law can be set up as a defence. It has been shown that, in many cases, it is no defence to an action upon a contract, entered into by a corporation in violation of its charter, that the making of the contract was an unauthorized exercise of corporate power.¹ The principle of this rule has been applied to contracts of membership in a corporation. And it has been held that, if a party has agreed to be a shareholder in a corporation, and has acted as shareholder, enjoying the benefits and privileges of membership, he cannot afterwards refuse to perform the obligations of a shareholder, upon the ground that the formation of the corporation was not authorized by law. Justice between the members of the company, in such case, demands that those who have shared in the benefits of the joint undertaking shall also share in its burdens;² and public policy demands that the capital of a corporation be preserved for the benefit of its *bona fide* creditors, although the company may have

¹ *Supra*, §§ 648-654.

² *Supra*, § 802 *et seq.*

been formed in violation of the general common law prohibition. Accordingly, in *East Pascagoula Hotel Co. v. West*,¹ which was a suit upon a promissory note, the court said: "It appears that the consideration of the note was for three shares of the stock of the company. It is contended that the legislature of Louisiana cannot authorize a corporation to carry on business solely and exclusively in another sovereign State; and further, that the formalities of law were not all followed in the organization of the company. These objections, if valid, cannot be successfully urged by the defendant. He has become a stockholder in the company, and has thus held it out to the world as a legally incorporated company, and has thus partly added to the credit of the company, and enabled it to make purchases for its benefit. He cannot now, by such objections, refuse to pay his note for stock; for it was on the faith of his note, and notes of a similar character, that the public may have been induced to credit the company."

§ 742. *Subscription cannot be avoided if Innocent Parties would be misled.* — A person who has subscribed for shares in a corporation, and has allowed his name to appear on the company's stock-books, ought not to be allowed to repudiate his contract on the ground that it was irregular and contrary to law, if other parties who have relied on the validity of the subscription, without notice of the irregularity, would be defrauded thereby. Under these circumstances, the law will not enable the subscriber to accomplish a fraud by treating the subscription as void.² Thus, if the legality of a subscription for shares depends upon conditions the performance of which is not a matter of public record, as, for example, where a preliminary deposit of cash is required, the subscriber will be liable as a shareholder although he has

¹ *East Pascagoula Hotel Co. v. Bradw.* 88; *Graff v. Pittsburgh, &c. West*, 18 La. Ann. 545. See also *R. R. Co.*, 81 Pa. St. 489; *Hays v. Buffalo, &c. R. R. Co. v. Gifford*, 87 Pa. St. 81; *Bedford R. R. Co. v. Bowser*, N. Y. 294; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Rikhoff v. Brown's, &c.* 48 Pa. St. 29; *Ferris v. Strong*, 3 Sewing Machine Co., 68 Ind. 388; *Edw. Ch.* 127.

² Compare *supra*, §§ 107, 303.

Rutz v. Esler, &c. Manuf. Co., 8

failed to comply with the law, if other subscriptions have been obtained on the faith of this subscription, or if the corporation has obtained credit by treating it as part of its capital stock.¹

§ 748. *Cases in which Irregular Contracts of Membership were held binding.*—It may be stated as a general rule, subject to the limitations heretofore referred to, that if a person has agreed to become a stockholder in a corporation, and has enjoyed the benefits and privileges of membership, he cannot, when called upon to perform the obligations of his contract, set up as a defence that the corporation was not legally organized, or that he did not comply with the requirements of the law in becoming a member.²

Thus, in *Phoenix Warehousing Co. v. Badger*,³ a stockholder set up as a defence to an action brought by the corporation for an unpaid balance due upon his shares, that the company was formed for purposes which were not authorized by the law under which it was organized. But the court

¹ *Pittsburgh, &c. R. R. Co. v. Applegate*, 21 W. Va. 172.

² *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Buffalo, &c. R. R. Co. v. Cary*, 26 N. Y. 75, 77; *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Cayuga Lake R. R. Co. v. Kyle*, 64 N. Y. 185; *Dutchess Cotton Manuf. Co. v. Davis*, 14 Johns. 238; *Georgia Ice Co. v. Porter*, 70 Ga. 637; *Tar River Nav. Co. v. Neal*, 8 Hawkes, 520; *Wilmington, &c. R. R. Co. v. Thompson*, 7 Jones, Law, 387; *Brookville, &c. Turnpike Co. v. McCarty*, 8 Ind. 392; *Heaston v. Cincinnati, &c. R. R. Co.*, 16 Ind. 279; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Danbury, &c. R. R. Co. v. Wilson*, 22 Conn. 435; *Central Plank Road Co. v. Clemens*, 16 Mo. 359; *Maltby v. Northwestern, &c. R. R. Co.*, 16 Md. 422; *Pittsburgh, &c. R. R. Co. v. Stewart*, 41 Pa. St. 54; *Hays v. Pitts-*

burgh, &c. R. R. Co., 38 Pa. St. 81, 88; *Dayton, &c. R. R. Co. v. Hatch*, 1 Disney, 84. See also *Cromford, &c. Ry. Co. v. Lacey*, 3 Y. & J. 80; *Cheltenham, &c. Ry. Co. v. Daniel*, 2 Eng. Ry. Cas. 728; *Hull Flax, &c. Co. v. Wellesley*, 6 H. & N. 38.

Upon the same principle, it has been held that a member of a mutual insurance company cannot set up the invalidity of the corporate organization as a defence to an action for assessments, after having acted as a member and received the benefits of membership. *Hill v. Reed*, 16 Barb. 280, 287; *Hyatt v. Whipple*, 37 Barb. 596; *White v. Coventry*, 29 Barb. 305; *White v. Ross*, 15 Abb. Pr. 66; *Trumbull County, &c. Ins. Co. v. Horner*, 17 Ohio, 407. Compare *Unity Ins. Co. v. Cram*, 43 N. H. 636, explained in *Ossipee, &c. Manuf. Co. v. Canney*, 54 N. H. 313.

³ *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 298.

said: "The defendant is not in a position to dispute the validity of the incorporation. He had become a stockholder, acted for several years as a trustee, taken part in its management, and contracted with it as a corporation."

A subscriber for shares before the incorporation of a company cannot be held liable upon his subscription until the company has been incorporated in the manner provided by law. But if the company organizes as a corporation without authority of law, and the subscriber acts as a shareholder, he will become liable as a shareholder by reason of his conduct, although the requirements of the law have not been fulfilled.¹

The same rule applies where formalities are required to be observed in making stock subscriptions, or in creating new members of a corporation already formed. Thus, a person who has been received as a shareholder, and has acted as a shareholder, cannot, when called upon to contribute the amount of his shares, set up as a defence, that he failed to pay the preliminary deposit required by law in making his subscription.² No informality in entering into the contract of membership would be a defence under these circumstances.³

¹ *Cayuga Lake R. R. Co. v. Kyle*, 64 N. Y. 185; *Buffalo, &c. R. R. Co. v. Cary*, 28 N. Y. 75, 77. See also *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126.

In *Ohio, &c. R. R. Co. v. McPherson*, 35 Mo. 13, 26, a subscriber set up, as a defence to an action for calls, that the proceedings to organize the corporation had been taken in a foreign State, and that there had been no valid incorporation. The court, however, said: "The appellant, having contracted with the respondent in its corporate name, paid his money to it as an existing thing in answer to its corporate demands, and from year to year having attended meetings of its stockholders and voted at elections and upon questions which clearly implied the respondent's existence, he ought to

be estopped from denying what he has thus often and so solemnly admitted."

² *Clark v. Monongahela Nav. Co.*, 10 Watts, 864; *Erie, &c. Plank Road Co. v. Brown*, 25 Pa. St. 156; *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169, 172; *Pittsburgh, &c. R. R. Co. v. Applegate*, 21 W. Va. 172; *Selma, &c. R. R. Co. v. Tipton*, 5 Ala. 797; *Greenville, &c. R. R. Co. v. Woodsides*, 5 Rich. L. 145; *McRae v. Russell*, 12 Ired. 224; *Haywood, &c. Plank Road Co. v. Bryan*, 6 Jones, Law, 82. See *Hayne v. Beauchamp*, 5 Sm. & M. 537; *Lewis v. Robertson*, 13 Sm. & M. 558. Compare *Wood v. Coosa, &c. R. R. Co.*, 32 Ga. 273-288; *Franklin v. Twogood*, 18 Iowa, 515.

³ Compare *supra*, §§ 71, 72. In *St. Charles Manufacturing Co. v.*

So it has been held that a subscriber for shares may become estopped by his conduct from setting up as a defence to an action for calls, that the number of shares required by law to authorize the corporation to be formed have not been subscribed.¹ And, for similar reasons, it has been held that an irregular transfer of shares, which has been executed by the parties and assented to by the corporation, is binding upon the company and its creditors.²

§ 744. *The Validity of Contracts and Dealings of Corporations formed without Authority of Law.* — The formation of corporate associations is prohibited by the common law. When the legislature authorizes an association to act in a corporate capacity for certain purposes only, all corporate action of the association which is not so authorized remains subject to the common law prohibition.³ It seems reasonable, therefore, that the principles and rules which determine the validity of the unauthorized and therefore prohibited contracts and dealings of lawfully formed corporations should likewise determine the validity of the dealings of associations which have no authority to act in a corporate capacity for any purpose whatever. The effect of the common law prohibition upon the validity of corporate contracts and dealings of lawfully formed corporations has been considered in detail in the preceding chapter. It has been shown that the unauthorized contracts and dealings of such associations will in many instances be recognized and given effect by the courts, notwithstanding the common law prohibition.

In order to determine the validity and legal effect of any alleged corporate act of an association having no legal right to

Britton, 2 Mo. App. 290, it was held that a person who had by mistake signed an alphabetical list of subscribers to the company instead of the regular subscription book, but who had afterwards voted as a stockholder, was estopped from denying the validity of his subscription in an action brought for calls upon his shares. Compare *supra*, §§ 69, 677.

¹ New Hampshire, &c. R. R. Co. v. Johnson, 30 N. H. 390, 407; Hager v. Cleveland, 86 Md. 476. But see Oldtown, &c. R. R. Co. v. Veazie, 39 Me. 571; Somerset, &c. R. R. Co. v. Cushing, 45 Me. 524.

² Bargate v. Shortridge, 5 H. L. C. 297. Compare Evans v. Smallcombe, L. R. 3 H. L. 256; Spackman v. Evans, Id. 171.

³ *Supra*, § 648.

act in a corporate capacity, it is necessary to consider two distinct questions. First, did the association in fact do the act or make the contract in a corporate capacity, or become chargeable with it according to the established principles of the law of agency, and, secondly, what is the effect of the common law prohibition.

§ 745. The courts have in some instances failed to bear in mind the distinction between the actual existence of a corporate association and the legality of such an association after it has been actually formed. It seems to have been assumed in some of the cases, that a corporate association formed in violation of the general rule of the common law prohibiting such associations must necessarily be treated by the courts as a nullity, — as no corporation at all. This doctrine is not only founded on a misconception, but is in most instances unjust in its consequences. It is certainly not an enlightened method of administering justice, to lay down as an arbitrary rule that an accomplished fact shall be ignored and treated as non-existing. If a corporate association has actually been formed in violation of the law, the courts can generally best serve the interests of justice by recognizing the association as a corporation, although an unlawful one, until its actual existence has been terminated by direct means.

§ 746. *The Existence of a Corporation de facto is essential.* — It is a self-evident proposition, that a contract cannot be made with a corporation unless the corporation be in existence at the time. The creation of a contract with a corporation which does not exist would be a contradiction in terms, and is as impossible, in the nature of things, as a real contract with an imaginary person. It is essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, *de facto*, at the time when the contract was made.¹

¹ In *White v. Campbell*, 5 Humph. 38, a judgment creditor filed a bill to set aside a deed of trust which had been executed by the judgment debtor to secure his promissory note to the Bank of Tennessee. It appeared that the charter of the bank had expired before the note and deed of trust were executed. The court held that the

It is a different question whether it be necessary to show that the corporation was in existence *de jure*, or by authority of law. A corporation actually in existence *can* enter into a contract, though the association may have been formed without authority, and its acts be forbidden by law ; and the legal validity of such contract will depend wholly upon the effect of the legal prohibition. So a person *can* make a contract, forbidden by law, in his individual capacity ; whether such contract will be enforced by the courts, or treated as legally void, or be the cause of other legal consequences, depends upon the terms of the prohibition.¹

§ 747. Application of the Law of Agency to Corporations *de facto*. — The principles and rules of the law of agency apply equally to all corporations, whether they were formed lawfully or not. According to the general rules of the law of agency, a corporation cannot be charged as principal with an act performed by another party as agent on its behalf, unless such other party was authorized by the corporation to do that act on its behalf. This rule applies equally to the acts of the majority of the shareholders, of the directors and ordinary agents, and of persons having no connection with the corporation.² Therefore, if a corporate act performed by the majority or by any inferior agent of a corporation was in excess of the authority conferred by the company, this may be a valid defence in an action to charge the company with

complainant was entitled to the relief prayed. Turley, J., delivering the opinion, said: "That the Bank of the State of Tennessee was not in existence at the time the note and deed of trust were executed, is not and cannot be controverted. The necessary consequence is, that both the note and deed of trust are inoperative and void, the one for the want of a payee, and the other for the want of a *cestui que trust*. . . . It is argued that it appears from the answer of the defendant that the debt was fairly due from the defendant

Campbell, and that the intention in executing the note and deed of trust was to secure the stockholders in that amount, and not the institution. This argument is a fallacy. We cannot recognize the existence of stockholders of a defunct corporation, and we cannot in this case go behind the note and deed to hunt for a different payee and a different *cestui que trust* from that mentioned in the instrument."

¹ See *supra*, §§ 648-653.

² *Supra*, §§ 577, 641.

the act, even though the absence of a legal incorporation be none. It is to be observed, however, that the general doctrine is subject to two important exceptions.¹

The scope of the powers of a majority, and of the agents of a corporation *de facto*, must be fixed in the same manner as in case of a corporation *de jure*. If there was an attempt to create a corporation according to law, — and this is nearly always the case, — the charter or articles of association which have been adopted by the shareholders or members of the association will indicate the terms of their fundamental agreement; and the powers of the various agents appointed to represent the association in its dealings depend upon the terms of their appointment, the by-laws adopted for the government of the association, and the customs and methods of business.

§ 748. **Members of an Association are not liable as Partners upon Contracts intended to bind the Association as a Corporation.** — If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of such association cannot be charged as parties to the contract, either severally or jointly, or as partners. This is equally true whether the association was in fact a corporation or not, and whether the contract with the association in its corporate capacity was authorized by the legislature or prohibited by law and illegal. The fact that the parties have failed to make a binding contract, as contemplated, because they erroneously supposed that the association was a corporation, or because the agreement actually entered into was prohibited by law and invalid, would certainly not be a reason for treating them as if they had entered into a different agreement which neither of the parties contemplated. If an association undertakes to enter into a contract as a corporation, it is clear that the members of the association do not agree to be parties to the contract severally or jointly. They do not agree to be bound as partners either to each other or to the party contracting with the association. It is equally

¹ See *supra*, §§ 585, 618.

clear, that the party contracting with the association does not intend to contract with its members individually. To treat the individual members of the association as parties to the contract, under these circumstances, would therefore involve not only the nullification of the contract which was actually contemplated by the parties, but the creation of a different contract, which neither of the parties intended to make.¹

It seems surprising that the authorities should be conflicting upon so plain a proposition. Yet there are numerous cases in which parties have been held by the courts to be liable as partners, upon contracts which were intended to bind them as a corporate association only.² In these cases the courts seem to have proceeded on a theory that, if the associates cannot be treated as a corporation, they must necessarily be held liable as partners, irrespective of the agreements actually made. Upon a similar theory, it would follow that, if a contract made on behalf of a legally incorporated company is not binding upon the corporation because in ex-

¹ *Planters', &c. Bank v. Padgett*, 69 Ga. 159, 164; *Merchants', &c. Bank v. Stone*, 38 Mich. 779; *Fay v. Noble*, 7 Cush. 188; *Trowbridge v. Scudder*, 11 Cush. 83; *First Nat. Bank v. Almy*, 117 Mass. 476; *Blanchard v. Kaull*, 44 Cal. 440. Compare *Harrod v. Hamer*, 32 Wis. 162; *Second Nat. Bank v. Hall*, 35 Ohio St. 158; *Stafford Nat. Bank v. Palmer*, 47 Conn. 448; *Central City Savings Bank v. Walker*, 66 N. Y. 424; *McClinch v. Sturgis*, 72 Me. 288; *Humphreys v. Mooney*, 5 Col. 282; *Glen v. Breard*, 35 La. Ann. 875; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Fuller v. Rowe*, 57 N. Y. 23; *National Union Bank v. Landon*, 45 N. Y. 410; *Chaffe v. Ludeling*, 27 La. Ann. 607; *Vredenburg v. Behan*, 38 La. Ann. 627; *Medill v. Collier*, 16 Ohio St. 599; *State v. How*, 1 Mich. 512.

Until the capital stock of a man-

ufacturing corporation organized in Massachusetts under the Gen. Sta. c. 61, has been divided into shares, the associated members hold the whole capital stock in common as regards creditors, and are liable accordingly. *Hawes v. Anglo-Saxon Pet. Co.*, 101 Mass. 385; 111 Mass. 200. Compare *Burnap v. Haskins Steam-Engine Co.*, 127 Mass. 586.

² *Bigelow v. Gregory*, 73 Ill. 197; *Field v. Cooks*, 16 La. Ann. 153; *Abbott v. Omaha Smelting, &c. Co.*, 4 Neb. 416; *Hill v. Beach*, 1 Beas. 31; *Hess v. Werts*, 4 S. & R. 356; *Garnett v. Richardson*, 35 Ark. 144; *Coleman v. Coleman*, 78 Ind. 344; *Kaiser v. Lawrence Savings Bank*, 56 Iowa, 104; *Martin v. Fewell*, 79 Mo. 401, 410. Compare *Holbrook v. St. Paul Fire, &c. Ins. Co.*, 25 Minn. 229; *Ash v. Guie*, 97 Pa. St. 493; *Richardson v. Pitts*, 71 Mo. 128.

cess of the company's chartered powers, the members of the company would be chargeable individually as partners. This proposition, however, appears never to have received judicial sanction.

§ 749. It should be observed that, if a contract is made with an association the members of which *are partners as between themselves*, every member of the association is liable upon the contract as a partner, whether the party contracting with the association knew that he was a partner or not.¹ So, if a partnership association does business in the name of an individual, or even in a corporate name, any person dealing with the association in that name may hold the members liable as partners, although he did not know the real character of the association at the time. The liability of the members of the association under these circumstances arises from the fact that they are actually partners as between themselves.²

§ 750. *Contracts entered into by a Corporation de facto are binding after having been executed by either Party.*—Subject to the limitations referred to in the preceding sections, it may be stated as a rule, that a person who has contracted with an association assuming to be incorporated, and acting in a corporate capacity, cannot, after having received the benefit of the contract, set up as a defence to an action brought upon it by the company, that the latter was never legally incorporated, or that it had no authority to enter into the contract in a corporate capacity.

In *Palmer v. Lawrence*,³ the receiver of a banking corporation sued to foreclose a mortgage executed by the defendant to the company. It was claimed, in answer, that the company had never been legally incorporated. But the Court held that fraud or illegality in the organization of the

¹ This is in accordance with the general rule, that a party dealing with an agent of an undisclosed principal may hold the latter liable. *Field v. Cooks*, 16 La. Ann. 153; *Ridenour v. Mayo*, 40 Ohio St. 9; *Ferris v. Thaw*, 72 Mo. 449. Compare *New York Iron Mine v. Ne-gaunee Bank*, 39 Mich. 644.

² See *Frost v. Walker*, 60 Me. 468; *Farnum v. Patch*, 60 N. H. 294; *Pettis v. Atkins*, 60 Ill. 454;

³ *Palmer v. Lawrence*, 3 Sandf. 161, 169, 170.

company was not a defence to the bill, although it might enable the State to dissolve the association. Duer, J., said: "The general rule, which is fairly deducible from all the cases on this subject, was stated and acted upon by this court in *Brouwer v. Appleby*.¹ It is, that a defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to contract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the State."²

This rule does not rest upon the doctrine of estoppel, as has sometimes been said,³ but is founded upon the policy of the common law prohibition against unauthorized corporate action.⁴ There is no element of an estoppel in the case.

§ 751. It has been held repeatedly, that a party who has executed a promissory note to a corporation cannot, in an action upon the note, set up as a defence that the company was not legally incorporated at the time the note was delivered.⁵

¹ *Brouwer v. Appleby*, 1 Sandf. 158.

² See also *Worcester Medical Institution v. Harding*, 11 Cush. 285; *West Winsted Savings Bank v. Ford*, 27 Conn. 282; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 354; *McFarlan v. Triton Ins. Co.*, 4 Denio, 392; *Evansville, &c. R. R. Co. v. Evansville*, 15 Ind. 395 (compare *Snyder v. Studebaker*, 19 Ind. 465); *Jones v. Kokomo Building Ass.*, 77 Ind. 340; *Alexander v. Tolleston Club*, 110 Ill. 65; *City of St. Louis v. Shields*, 62 Mo. 247; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208, 218; *Butchers', &c. Bank v. McDonald*, 130 Mass. 264; *semble*, *Bartlett v. Wilbur*, 53 Md. 485, 498.

The general laws of California provide that "the question of the due incorporation of any company claiming in good faith to be a corporation under the laws of this State, and doing business as such corporation, or its right to exercise corpo-

rate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party, but such inquiry may be had at the suit of the State, or information of the attorney-general." *Hitton's Gen. Laws*, art. 751, sect. 6. *Bakersfield Town Hall Ass. v. Chester*, 55 Cal. 98.

³ See *Oregonian Ry. Co. v. Oregon Ry., &c. Co.*, 22 Fed. Rep. 245, 249; s. c. 23 Fed. Rep. 292; *Heaston v. Cincinnati, &c. R. R. Co.*, 16 Ind. 279.

⁴ See *supra*, § 692.

⁵ *Massey v. Citizens' Building, &c. Ass.*, 22 Kans. 624; *East Tenn. Iron Manuf. Co. v. Gaskell*, 2 Lea, 742; *Studebaker, &c. Manuf. Co. v. Montgomery*, 74 Mo. 101; *Platte Valley Bank v. Harding*, 1 Neb. 461; *John v. Farmers', &c. Bank*, 2 Blackf. 367; *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 90; *Blake v. Holley*, 14 Ind. 383; *Meikel v. German Savings Fund Soc.*, 16

In *Douglas County v. Bolles*, suit was brought by a *bona fide* purchaser of municipal bonds issued to a railroad company in payment for shares. The county set up as a defence, that the railroad company had never been incorporated. But the Supreme Court said: "It has been a corporation *de facto* at least, if not *de jure*, from the date of its organization. Its corporate existence, therefore, and its ability to contract, cannot be called in question in a suit brought upon evidence of debt given it."¹

The same rule applies in suits upon other classes of contracts made with corporations *de facto*, although not organized pursuant to law.²

§ 752. The same rule is applicable in a suit brought against a corporation upon a contract which has been performed by the other party. A company which has entered into a contract in a corporate capacity cannot, after the contract has been performed by the other party, set up, as a defence to an action for damages for a non-performance of its part of the agreement, that it was not constituted a corporation in pursuance of authority conferred by law.³

So, a mortgage executed by a corporation *de facto* cannot

Ind. 181; *Vater v. Lewis*, 36 Ind. 288; *Congregational Soc. v. Perry*, 6 N. H. 164; *Jones v. Bank of Tennessee*, 8 B. Monr. 122; *Jones v. Dana*, 24 Barb. 395; *Hamtramck v. Bank of Edwardsville*, 2 Mo. 169; *Farmers', &c. Bank v. Williamson*, 61 Mo. 259; *Stoutimore v. Clark*, 70 Mo. 471; *Smith v. Mississippi, &c. R. R. Co.*, 14 Miss. 179.

Compare *Williams v. Bank of Michigan*, 7 Wend. 540; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *White v. Campbell*, 5 Humph. 38; *Montgomery R. R. Co. v. Hurst*, 9 Ala. 514; *National Bank v. Orcutt*, 48 Barb. 256; *Wilcox v. Toledo, &c. R. R. Co.*, 48 Mich. 584; *Butchers', &c. Bank v. McDonald*, 130 Mass. 264.

¹ *Douglas County v. Bolles*, 94

U. S. 104; *County of Leavenworth v. Barnes*, 94 U. S. 70; *Camp v. Byrne*, 41 Mo. 525; *Smith v. County of Clark*, 54 Mo. 58; *Goodrich v. Reynolds*, 31 Ill. 490; *Mitchell v. Deeds*, 49 Ill. 417.

² *Imboden v. Etowah, &c. Mining Co.*, 70 Ga. 86.

³ *Blackburn v. Selma, &c. R. R. Co.*, 2 Flipp. 525; *Aller v. Town of Cameron*, 3 Dill. 198; *Dooley v. Cheshire Glass Co.*, 15 Gray, 494; *Empire Manuf. Co. v. Stuart*, 46 Mich. 482; *Racine, &c. R. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 346; *Stone v. Berkshire, &c. Soc.*, 14 Vt. 86; *Rush v. Halcyon Steamboat Co.*, 84 N. Car. 702; *Reynolds v. Myers*, 51 Vt. 444. *Contra*, *Boyce v. Townsontown Station, &c. Church*,

46 Md. 359.

afterwards be avoided by the company, or by parties claiming under it, on the ground that the company was not legally created a corporation.¹

§ 753. *Transfers of Property by or to a Corporation de facto are valid.* — A grantor who has conveyed property to a corporation existing *de facto* cannot, after having received the consideration money, treat the conveyance as a nullity merely because the corporation was formed without legislative authority. The transfer will be held valid and binding, as against all parties but the State. It is equally well settled, that a conveyance executed by a corporation will not be treated as invalid merely because the corporation was not formed under authority of law.² A grantee who has received a conveyance from a company acting in a corporate capacity cannot, when called upon to pay the purchase money, set up as a defence, that the company was a self-constituted corporation, having no legal powers.³

So, a mortgage executed by or to an unauthorized association may be enforced according to the contract of the parties.⁴

§ 754. The same rules apply to the transfer of personal property and choses in action by or to corporations *de facto*, formed without complying with the requirements of the law.

¹ *Williamson v. Kokomo Building, &c. Ass.*, 89 Ind. 389; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548, 558; *Hasenritter v. Kirchhoffer*, 79 Mo. 289. See also *Haselman v. U. S. Mortgage Co.*, 97 Ind. 865; *Keene v. Van Reuth*, 48 Md. 184; *West Winsted Savings Bank v. Ford*, 27 Conn. 282; *People's Savings Bank v. Collins*, Id. 142; *Franklin v. Twogood*, 18 Iowa, 515; *Hubbard v. Chappel*, 14 Ind. 601.

² *Smith v. Sheeley*, 12 Wall. 858; *Cowell v. Springs Co.*, 100 U. S. 55, 60; *Close v. Glenwood Cemetery*, 107 U. S. 466; *Sword v. Wick-ersham*, 29 Kans. 746; *City of*

Denver v. Mullen, 7 Col. 845; *Call v. Citizens' Mut. Building Ass.*, 61 Ala. 232; *Baker v. Neff*, 73 Ind. 68; *Thompson v. Candor*, 60 Ill. 244; *Snyder v. Studebaker*, 19 Ind. 462, overruling *Harriman v. Southam*, 13 Ind. 190; *Case v. Benedict*, 9 Cush. 540. Compare *Morgan v. Donovan*, 58 Ala. 255; *Carey v. Cincinnati, &c. R. R. Co.*, 5 Iowa, 858; *Doyle v. Mizner*, 42 Mich. 832.

³ *Dooley v. Wolcott*, 4 Allen, 406. Compare *Cowell v. Springs Co.*, 100 U. S. 56, 60, and other cases in the preceding note.

⁴ *Palmer v. Lawrence*, 3 Sandf. 161. *Supra*, § 750.

The illegality of the corporate organization will not affect the validity of the transfer.¹ Thus, in a suit against the maker of a promissory note indorsed by a corporation to the plaintiff, the validity of the organization of the company cannot be attacked in order to show that it could not take or transfer the note. And so in a suit brought by a corporation *de facto*, as indorsee of a promissory note, against the maker, the latter cannot prevent a recovery by showing that the company was not legally incorporated.²

§ 755. *The Liability of the Members of a Corporation de facto to Creditors.*—The rules referred to in the preceding sections are applicable in an action brought by a creditor of an insolvent corporation to enforce the liability of its shareholders to pay the amount of their stock subscriptions. In a case of this character, the defendants cannot impeach the binding force of their contracts or membership, by showing that the formation of the corporation was unauthorized by law; nor can they establish the invalidity of the obligation assumed by the company in favor of the complainant, upon the ground that the company had no authority to act in a corporate capacity.³ The same rule applies in a suit brought by an in-

¹ Nutting v. Hill, 71 Ga. 557.

In an action brought by a corporation *de facto* for a wrongful appropriation of property owned by it, it is no defence that the company was not incorporated according to law. *Perse, &c. Paper Works v. Willett*, 1 Robertson, 131; *Dannebrogge Gold, &c. Co. v. Allment*, 26 Cal. 286; *Elizabeth City Academy v. Lindsey*, 6 Ired. L. 476.

A creditor who has dealt with a corporation *de facto*, and obtained a preference in distributing its assets after insolvency, cannot defend against a suit brought by a receiver to recover these assets, by showing that the company had not been legally incorporated. *Rafferty v. Bank of Jersey City*, 38 N. J. Law, 368. See *Wallace v. Loomis*, 97 U. S. 146.

² *Smelser v. Wayne, &c. Turnpike Co.*, 82 Ind. 417; *Mullikin v. City of Bloomington*, 72 Ind. 161; *Baker v. Neff*, 73 Ind. 68. And see cases *supra*, § 751.

³ *Eaton v. Aspinwall*, 19 N. Y. 119; *Frost v. Walker*, 60 Me. 468; *Wheelock v. Kost*, 77 Ill. 296; *McHose v. Wheeler*, 45 Pa. St. 32, 41; *Hager v. Cleveland*, 36 Md. 476; *Holyoke Bank v. Goodman Paper Co.*, 9 Cush. 576; *Walworth v. Brackett*, 98 Mass. 98. Compare *Utiley v. Union Tool Co.*, 11 Gray, 139; *Gaff v. Fleisher*, 33 Ohio St. 107; *Central Agricultural, &c. Ass. v. Alabama, &c. Ins. Co.*, 70 Ala. 120; *Keyser v. Hitz*, 2 Mackey (D. C.), 478.

The rule applies where the corporation was formed under an unconstitutional law. *Freeland v.*

solvent corporation,¹ or by a receiver appointed by the court,² for the purpose of collecting the stock subscriptions of the members of the company in order to pay off creditors. And it is immaterial in a case of this kind that the corporation has, since the creation of the indebtedness, been dissolved by the State on the ground that it was never legally incorporated.³

In *Chubb v. Upton*,⁴ an assignee in bankruptcy of a corporation sued a shareholder of the company upon his stock liability. The defendant set up as a defence, that the corporation was not organized according to law, and that the shares which he had subscribed were never legally issued. The court, however, held that the defendant was liable, as he had acted as a shareholder and taken part in the management of the company. Justice Hunt, delivering the opinion, said:—

“It is settled by the decisions of the courts of the United States, and by the decisions of many of the State courts, that one who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its organization. This was settled more than half a century since in the courts of the State of New York, and has recently been affirmed in this court.⁵

“The same principle applies to the case of a subscription to the capital stock in an organization which has attempted irregularly to create itself a corporation, and has acted as such.⁶

Pennsylvania Central Ins. Co., 94 Pa. St. 504; *McCarthy v. Lavasche*, 89 Ill. 270.

¹ *Ossipee, &c. Manuf. Co. v. Canney*, 54 N. H. 295; *East Pascagoula Hotel Co. v. West*, 13 La. Ann. 545.

² *Ruggles v. Brock*, 6 Hun, 164; *In re Reciprocity Bank*, 22 N. Y. 17; *Clarke v. Thomas*, 34 Ohio St. 46; *Hull Flax, &c. Co. v. Wellesley*, 6 H. & N. 38; *Chubb v. Upton*, 95 U. S. 665.

³ *Rowland v. Meader Furniture Co.*, 38 Ohio St. 270; *Gaff v. Fleisher*, 33 Ohio St. 107, 115, 453.

⁴ *Chubb v. Upton*, 95 U. S. 665; *Upton v. Hansbrough*, 3 Biss. 417; *Upton v. Jackson*, 1 Flipp. 413; *Hammond v. Straus*, 53 Md. 1.

⁵ Citing *Dutchess Cotton Manuf. Co. v. Davis*, 14 Johns. 237; *Sanger v. Upton*, 91 U. S. 56; *Upton v. Tribilecock*, Id. 45; *Buffalo, &c. R. R. Co. v. Cary*, 26 N. Y. 75; *Bissell v. Michigan Southern R. R. Co.*, 22 N. Y. 258.

⁶ Citing *Methodist Episcopal Church v. Pickett*, 19 N. Y. 482; *Upton v. Hansbrough*, 3 Biss. 417.

"The rule applies to increasing the stock of a corporation, when the question arises upon paying a subscription for stock forming a part of such increase. The duty and the necessity of performing the contract of subscription are the same as in case of an original stockholder.¹

"An assignee appointed under the bankrupt laws of the United States represents both the corporation and its creditors, and the defence of irregular organization cannot be urged against him."

§ 756. *Foreign Corporations.* — The principles and rules stated in the preceding sections are applicable in actions brought by or against foreign corporations. A person who has contracted with a corporation *de facto*, claiming to have been incorporated under the laws of a foreign State, cannot, after the contract has been performed on the part of the corporation, impeach the validity of the contract, upon the ground that the company was incorporated without legislative authority, and that the making of the contract involved an unauthorized exercise of corporate power.²

§ 757. *Companies formed by Consolidation.* — The same principle is applicable to contracts entered into by a *de facto* corporation, formed by the consolidation of other companies. After two corporations have been actually consolidated, it is no defence to an action brought upon evidences of debt given to the new company formed by consolidation, that the consolidation was effected without complying with the formalities prescribed by law.³ Nor could this objection be raised by the corporation itself, or those claiming under it, against third parties.

§ 758. *Corporations formed for Immoral or Illegal Purposes.* — The preceding sections relate merely to the effect of the general rule of the common law prohibiting the formation of cor-

¹ On this point, see *infra*, § 761.

² *Racine, &c. R. R. Co. v. Farm-*

³ *Newburg Petroleum Co. v. ers' L. & T. Co.*, 49 Ill. 347; *Mitchell Weare*, 27 Ohio St. 354. See also *v. Deeds*, Id. 417; *Venable v. Ebenezer Baptist Church*, 25 Kans. 177; *Bank, 21 N. Y. 542*; *Williams v. Branch v. Jesup*, 106 U. S. 468. *Cheney*, 8 Gray, 215; *Barrett v. Mead*, 10 Allen, 337.

porations unless authorized by the legislature or sovereign. If the formation of a corporate association is not only prohibited by this general rule of the common law, but is also in violation of some principle of morality or public policy, or a positive statutory prohibition, the parties forming such association will not be legally bound by their agreement of membership, and the courts will not recognize the association, either as among its members or against third parties. Thus, a corporate association formed for the purpose of resisting the enforcement of the law,¹ or for the purpose of aiding a rebellion against the government,² or for the purpose of violating any prohibition of the constitution or statutes of the State,³ will not be recognized by the courts, or be permitted to sue as a corporation.

However, the mere motive and intention of parties forming a corporation cannot be inquired into. If the purpose of a corporation, as indicated by its articles of association, is legal, and the incorporation is effected in the manner prescribed by law, the intention of the incorporators is immaterial. Even if the corporation should afterwards, in pursuance of the pre-existing intention of those forming it, depart from its authorized purposes, that would merely be a ground for dissolving it at the suit of the State, as in other cases where a corporation violates the law.⁴

§ 759. Corporations formed under Unconstitutional Laws. —

A corporation formed in violation of a prohibition of the constitution of a State, like a corporation formed in violation of a prohibitory act of the legislature, will not, as a rule, be recognized by the courts for the purpose of suing and enforcing rights founded on such illegal incorporation.⁵ There is, however, a difference between a constitutional prohibition

¹ *Detroit Schuetzen Bund v. Detroit Agitations Verein*, 44 Mich. 313.

² *Chicora Company v. Crews*, 6 S. Car. 243. Compare *Importing, &c. Co. v. Locke*, 50 Ala. 332; *United States v. Insurance Companies*, 22 Wall. 99.

³ *St. Louis, &c. Ass. v. Hennessy*, 11 Mo. App. 555; and see the two following sections.

⁴ *Importing, &c. Co. v. Locke*, 50 Ala. 332. *Infra*, § 769.

⁵ See the preceding section.

designed to prevent the formation of corporations of a certain class or for certain purposes, and a provision whose sole object is to limit the power of the legislature to pass general or special incorporation laws. An act of incorporation passed by the legislature in violation of a provision of the latter description would undoubtedly be void, and no right or authority could be derived from it; but if persons should actually form a corporation under the provisions of such void act, they would not thereby violate the constitutional prohibition. The formation of the corporation under these circumstances would merely be contrary to the general common law prohibition, as in any other case where a corporation is formed without the consent of the sovereign. The legal status of a corporation formed under an unconstitutional law, as that of a corporation formed under no law at all, or without complying with such laws as may exist, both with regard to the rights and obligations of its members and the rights and obligations of the corporation in respect to parties dealing with it, should therefore be the same.

§ 760. Accordingly, it was held by the Supreme Court of Pennsylvania, in an action brought by a mutual insurance company against a policy-holder to recover assessments on premium notes, that the defendant could not, after having acted as a shareholder, avoid his agreement on the ground that the corporation was incorporated under an unconstitutional law.¹

McCarthy v. Lavasche,² was a suit brought by a creditor of a corporation to enforce the individual liability of a shareholder for double the amount of his shares. The defence was interposed, that the act of the legislature under which the corporation had been formed was unconstitutional. The Supreme Court of Illinois, however, held that the defendant was liable. Justice Walker said: "Appellant approved of the act, and availed himself of its benefits by subscribing

¹ *Freeland v. Pennsylvania Central Ins. Co.*, 94 Pa. St. 504. See also *McClinch v. Sturgis*, 72 Me. 288.

² *McCarthy v. Lavasche*, 89 Ill. 270, 275; *Dows v. Naper*, 91 Ill. 44. Compare *supra*, § 694.

for stock and becoming entitled to exercise all the rights and privileges of a stockholder in the corporation. Justice, morality, public policy, and precedent all demand that appellant should be estopped from denying the constitutionality of the law. . . . Suppose these stockholders had formed a partnership, with articles of partnership containing precisely the same provisions that are contained in their charter, and had put in capital to the same extent and the same amounts they each subscribed in shares, would any one question the legality of the organization, or the legal liability of each of the members of the firm? We apprehend these propositions would be conceded. And if so in principle, what distinction can be taken between the supposed case and the one at bar?"

It is evident that, if the constitutional prohibition in these cases had been directed against the formation and existence of associations of the kind in question, a different conclusion would have been reached.

The rule in Michigan appears to be, that a corporation organized under a void act of the legislature will not be recognized by the courts for the purpose of enforcing a mortgage executed to it; but if the corporation was not formed for an unlawful purpose, a receiver of its property may enforce an accounting in equity for the debt secured by the mortgage.¹ It was, however, decided by the same court, that a corporation which had not been properly organized under any existing law of the State, could be sued upon a note which it had executed in its corporate name.²

§ 761. The Validity of an unauthorized Issue of Shares or Increase of Capital Stock. — Rights of Purchasers of Certificates. — In determining the legal effect of an issue, by the agents of a corporation, of shares or certificates for shares in excess of

¹ *Burton v. Schildbach*, 45 Mich. 504; *Mok v. Detroit Building, &c. Ass.*, 30 Mich. 511. Compare *State v. How*, 1 Manning (Mich.), 512; *Green v. Graves*, 1 Dougl. (Mich.) 351; *Hurlbut v. Britain*, 2 Id. 191; *De Bow v. People*, 1 Denio, 9; *Me- dill v. Collier*, 16 Ohio St. 599. In these cases the corporations appear to have been formed for illegal purposes, namely, to violate the laws against unauthorized banking, as well as without constitutional legislative authority.

² *Empire Manuf. Co. v. Stuart*, 46 Mich. 482.

the amount allowed by the charter or law under which the corporation was formed, it is necessary to take into consideration (1.) the just claims of the existing shareholders in the company, (2.) the just claims of the purchaser or holder of the shares or certificates so issued, (3.) the just claims of creditors, and (4.) the consequences of the legal prohibition against the issue of such shares or certificates.

It is settled that, where the amount of the capital stock of a corporation is fixed by its charter or articles of association, no authority exists to alter the amount so fixed, or to issue additional shares.¹ The agents of the corporation, and even the majority of the shareholders, would have no authority to create new shares after the limit fixed by the charter or articles of association of the company was reached. The issue of certificates for any shares in excess of the amount so fixed would likewise be unauthorized, for such certificates would involve a false representation to the world that the holder of the certificate was a shareholder in the company.²

However, if certificates for shares in a corporation have been issued by agents of the corporation having authority under ordinary circumstances to issue such certificates, a *bona fide* purchaser of the certificates is entitled to rely upon the truth of the representations contained in the certificates, and ought therefore to be protected from loss, although their issue was unauthorized. Accordingly, it is held that a *bona fide* purchaser of certificates for shares in a corporation, issued in due form by agents of the company having authority to issue such certificates under ordinary circumstances, can compel the corporation to recognize the certificates as valid, and accord to him the rights of a shareholder, unless the creation of the new shares is prevented by some legal prohibition; and if the shares which the certificates purport to represent cannot legally be created, by reason of some legal prohibition, the purchaser is entitled to recover his damages from the corporation for the false representations contained in the certificates.³ Under these circumstances,

¹ *Supra*, § 484.

² See *supra*, § 615.

³ See *supra*, §§ 185, 186.

the purchaser would likewise have his remedy against the agents who were guilty of the fraud.¹

§ 762. **Validity of an unauthorized Issue of Shares where the Holder has acted as Shareholder.** — It appears to be settled by authority, that a *bona fide* purchaser of certificates for shares issued by the agents of a corporation in excess of their authority, cannot compel the corporation to treat the certificates as valid, and accord to him the rights of a shareholder, if the corporation would thereby be compelled to increase its capital stock beyond the amount fixed by its charter or articles of association. The purchaser of the certificates under these circumstances would have his remedy in an action for damages for the fraud.²

A different case is presented where all the existing shareholders in a corporation have consented to or ratified an issue of shares in excess of the amount authorized by law, and the holder of the shares has acted as a shareholder and enjoyed the benefits of membership. It is not clearly settled whether the courts will, under these circumstances, give effect to the agreement of the parties and recognize the shares, or treat the unauthorized shares as wholly null and void. It may be argued, on the one hand, that the creation of shares in excess of the amount authorized by law is illegal, because prohibited by the rules of the common law, and that the creation of such shares would involve a continuing usurpation of franchises on the part of the shareholders. On the other hand, it may be said, that the public interests and immediate justice are best served, in a case of this kind, by leaving the State to enforce the penalty for the violation of the law by a direct proceeding instituted for that purpose; that great practical injustice between parties would often be done if shares were arbitrarily treated as void after the holder had obtained the advantages or borne the burdens of membership, and that no public benefit would be attained thereby; and, finally, that there is no reason why an unauthorized issue of new shares in a legally constituted corpora-

¹ *Supra*, § 187.

² *Supra*, § 688; and see cases *infra*, § 763.

tion should be treated as null and void, while shares in a corporation formed without authority of law, and illegal at its inception, are recognized and given effect.¹

§ 763. **Rules established by the Decisions.**—It is difficult to deduce from the authorities bearing upon this subject any clearly defined principle of law. Two rules, however, seem to be established in the United States by force of the actual decisions. First, if a corporation has no legal right to increase the amount of its capital stock upon any terms, shares created in excess of the amount authorized by the charter or law under which the corporation was organized will be treated by the courts as null and void.² Secondly, if a corporation is authorized by law to increase its capital stock upon complying with certain prescribed forms or conditions, and the corporation or its agents appear to have endeavored to comply with the prescribed forms or conditions, and have in fact increased the company's capital stock by issuing new shares, on the assumption that the legal right to increase the capital stock had been acquired, and if the holder of such new shares has acted as a shareholder and enjoyed the rights of a shareholder, then the creation of such new shares will be recognized by the courts and given effect according to the intention of the parties, although the statutory forms or conditions were not complied with, and no legal right to create the new shares was in fact obtained.³

§ 764. The first of these rules rests upon the ground that the creation of shares in a corporation without legislative authority is prohibited by the common law, and that the contracts of membership represented by shares created in violation of the common law prohibition will not be recognized

¹ See *supra*, §§ 743, 757, 760.

² *Chubb v. Upton*, 95 U. S. 665;

³ *Scovill v. Thayer*, 105 U. S. 143, 148; *McCord v. Ohio, &c. R. R. Co.*, 13 Ind. 221; *Oler v. Baltimore, &c. R. R. Co.*, 41 Md. 583; *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513; *People's Bank v. Kurtz*, Id. 344; *Wright's Appeal*, Id. 425. *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Kansas City Hotel Co. v. R. R. Co.*, 57 Mo. 126; *Grangers' Life, &c. Ins. Co. v. Kamper*, 73 Ala. 325; *Veeder v. Mudgett*, 95 N. Y. 295, 310.

or enforced by the courts. The second rule can only be supported on the theory that the effect of the legal prohibition varies, and that the courts will recognize and enforce the unauthorized, and therefore prohibited, contracts of membership, represented by an unauthorized issue of shares, provided the circumstances mentioned in the rule concur. It has been suggested in some of the cases, that the ground of holding the creation of the shares legally binding under these circumstances is, that the parties are estopped from denying that the formalities prescribed by law as a condition precedent to the right of issuing the shares have in fact been complied with. But this view cannot be sustained, as the essential elements of a legal estoppel fail.¹ In most of the cases in which the rule was applied, the failure to comply with the statutory conditions precedent to the right of issu-

¹ Compare *supra*, § 692.

Kansas City Hotel Co. v. Hunt, 57 Mo. 128, 129, was an action brought by a corporation to recover the amount of a subscription for shares. It appeared that an attempt had been made to increase the capital stock of the company, but that a proper certificate had not been filed, as required by law. The defendant had subscribed for a portion of the new shares, and the question was whether he could repudiate his subscription upon the ground that a proper certificate had not been filed. The court held that a subscription alone, without any payment thereon or acts of user, did not bind the subscriber. Napton, J., delivering the opinion, said: "The certificate was imperfect, but, as it was on the public records, it was open to the inspection of all who desired to subscribe. If there were defects in it which would have influenced the defendant in his subscription, he had the opportunity of informing himself as to the facts.

He chose to subscribe to the stock, the increased stock *de facto*. . . . There could not be a doubt that the defendant, if there had been proof of his participation in the proceedings of the corporation in any shape, would have been held liable on his subscription. But there is no such proof. A defect in a certificate, it is well settled, is not available to a stockholder who has, by his conduct, waived the defect. . . . The authorities in regard to this point have been examined, and they all agree that where the subscription has been acquiesced in, either by the payment of part of the subscription, or by becoming a director, or by attending meetings of stockholders, or by any other act indicating an acquiescence in the validity of his subscription, his defence based on mere technical objections will be disregarded. But the present case is peculiar, in that it shows nothing but the bare act of subscribing."

ing the shares was a matter of public record, of which the parties were bound to take notice. Moreover, the rule has been applied in favor of the corporation and of parties who participated in the violation of the law.

§ 765. *The Rule applied by the Supreme Court of the United States.* — The authorities bearing on this question were reviewed by the Supreme Court of the United States in *Scovill v. Thayer*.¹ The facts of that case were as follows. A corporation was formed under the general laws of the State of Kansas, with a capital stock of \$100,000. Under the laws of Kansas the capital stock of the company could legally be increased to twice the amount first limited, upon complying with certain conditions, but any further increase was not authorized. The company, however, increased its capital stock to \$400,000, being double the amount allowed by law. The defendant was the holder of a portion of the unauthorized issue of shares, which he had paid up to the amount of fifty per cent. The company having become insolvent, the plaintiff was appointed assignee in bankruptcy, and the suit was brought to compel the defendant to contribute the amount unpaid on his shares for the purpose of satisfying creditors.

It was insisted on the part of the plaintiff, that, inasmuch as the defendant had attended by proxy meetings at which the illegal increase of stock was voted for, and had received certificates for the shares illegally created, and the company had, after such increase, represented to the world that it had a capital of \$400,000, and had invited and obtained credit on the faith of such representations, he was estopped from denying the validity of the stock and his obligation to pay for it in full. The court, however, held that the defendant was not liable. Justice Woods, delivering the opinion, said: "In this case, the attempt to increase the stock of the company beyond the limit fixed by its charter was *ultra vires*. The increased stock itself was therefore void."² It conferred

¹ *Scovill v. Thayer*, 105 U. S. 143, 149. lowed was the question in this case. It certainly was not a logical

² Whether this consequence followed was the question in this case. It certainly was not a logical conclusion that the creation of the

on the holders no rights, and subjected them to no liabilities. . . . It is true, that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. But those were cases where the increase of the stock was authorized by law. The increase itself was legal, and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant. But here the corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity, nor bind him to the corporation."¹

This language used by the learned judge must not be misunderstood. In *Chubb v. Upton*, and the other cases referred to in the second rule above stated, the increase of the capital stock would have been authorized by law, and would have been legal if the conditions precedent prescribed by law had been complied with. But as these conditions were not complied with, the increase was not in fact authorized by law, and was not legal; it was prohibited and illegal, and the State could have prevented or punished the violation of the law through suitable legal proceedings.

§ 766. *The Rule in England.* — In *Lindley on Partnership*, the rule with regard to English companies is stated to be as follows: "If shares can, under any circumstances, legally exist, then, however improper their issue may have been, the company and the holder of them may be estopped from denying their existence and the holding of them by him; but if they cannot legally exist, the person taking them cannot, by estoppel or otherwise, become a member in respect of them."²

This statement of the law, however, is hardly sustained by the authorities cited by the learned author.³

increased capital stock was void because it was not authorized by law. See *supra*, §§ 650, 701.

¹ 105 U. S. 149.

² 1 *Lindley on Part.* (4th ed.) 134. See also vol. 2, p. 1349.

³ *Campbell's Case*, L. R. 9 Ch. 1; *Challis's Case*, L. R. 6 Ch. 266;

§ 767. **The Rights of Creditors against the Holders of illegally issued Shares.**—The creditors of an insolvent corporation are clearly entitled to enforce any obligation to contribute to the company's assets which the corporation itself can enforce.¹ It follows, therefore, that if the holders of shares issued illegally, by an unauthorized increase of the company's capital stock, can be charged by the corporation as shareholders, creditors also can charge them as shareholders in respect of the shares so issued.²

However, the rights of creditors are not necessarily limited to the rights of the corporation itself. Although the rights of creditors against shareholders are usually treated only as equitable claims obtained indirectly through the corporation, this is only nominally correct. As a matter of fact, the parties forming a corporation invite credit and obtain credit for their association on the faith of the security which they agree to furnish individually, either by contributing to the fund constituting the company's capital, or by their individual liability for the corporate debts. In either event, the shareholders really assume an obligation directly to the creditors of the company, and the corporate entity through which this obligation is created is a fiction. It is evident, therefore, that a person may become liable to the creditors of a corporation as if he were a shareholder, although he may not in fact be a shareholder, or incur the liabilities of a shareholder, as between himself and the company.³

§ 768. **A Corporation de facto has no Special Powers.**—**The Power of condemning Land:**—It has been pointed out in a preceding section, that the legal validity of acts performed by

Hare's Case, L. R. 4 Ch. 508; Bank of Hindustan v. Alison, L. R. 6 C. P. 54, 222; Stace & Worth's Case, L. R. 4 Ch. 682; Smith's Case, Ib. 611; Spackman v. Evans, L. R. 3 H. L. 171.

¹ *Infra*, Chapter X.

² See Chubb v. Upton, 95 U. S. 665.

³ *Infra*, §§ 818, 824 *et seq.* If a

person having no connection with a corporation should offer to become liable as a shareholder to all persons who should give credit to a corporation, and this offer should be accepted by actually giving credit to the corporation, the resulting agreement would be valid as a common law contract. See McCarthy v. Lasasche, 89 Ill. 270.

a corporation in violation of a statute or of a general rule of the common law depends upon the same principles as the legal validity of acts performed by an individual under similar circumstances. Thus, a corporation has no more power than a mere individual to make a contract in violation of the usury laws, or to appropriate property belonging to another person. The same rule is clearly applicable to a corporation formed without authority of law; persons cannot extend their legal powers by assuming to act in a corporate capacity.

The power of condemning land for public purposes belongs to the State alone. No person or corporation, whether it be a legally formed corporation or not, can exercise this power unless expressly authorized to do so. Hence, if a statute conferring the power to condemn land is intended by the legislature to apply only to legally formed corporations, a corporation which has not been legally formed can derive no authority from it; and an attempt on the part of such a company to exercise the power will have no greater validity than if the statute had never been passed.

A statute purporting to confer the power of condemning land upon railroad companies incorporated under the laws of the State, is clearly intended to apply to legally incorporated companies only. It is not intended to apply to self-constituted corporations having no legal right to exist; and there seems to be no reason for applying a different rule in favor of companies which undertook to become incorporated according to law, but failed to comply with the forms prescribed by law as conditions precedent to a legal incorporation.¹

¹ *Newton County Draining Co. v. Nofsinger*, 48 Ind. 566; *Niemeyer v. Little Rock, &c. Ry. Co.*, 43 Ark. 111; *Powers v. Hazelton, &c. Ry. Co.*, 38 Ohio St. 429; *Re New York, &c. Ry. Co.*, 35 Hun, 220, 224; 99 N. Y. 13. Compare *Smelser v. Wayne, &c. Turnpike Co.*, 82 Ind. 419; *Western Pennsylvania R. R. Co.'s Appeal*, 104 Pa. St. 399; *Aurora, &c. R. R. Co. v. Miller*, 56 Ind. 88; *Same v. Lawrenceburgh, Id.* 80; *National Docks Ry. Co. v. Central R. R. Co.*, 82 N. J. Eq. 755, overruling *Central R. R. Co. v. Pennsylvania R. R. Co.*, 81 N. J. Eq. 475; *Atkinson v. Marietta, &c. R. R. Co.*, 15 Ohio St. 21, 33; *Atlantic, &c. R. R. Co. v. Sullivan*, 5 Ohio St. 276; *Atlantic, &c. R. R. Co. v. St. Louis*, 66 Mo. 228; *City of Denver v. Mullen*, 7 Col. 345. The following cases are apparently to the contrary: *McAuley*

*Re Brooklyn, &c. Railway Company*¹ was an application to condemn land for the construction of a railroad. The law under which the company had been organized contained the provision that, unless its road should be constructed within a certain period of time, "its corporate existence and powers shall cease." The Court of Appeals held that the company had no power to condemn land after its corporate franchises had been lost. Allen, J., delivering the opinion, said: "If, by non-performance of either of these conditions, the company forfeited or lost its corporate rights and powers, the fact may be asserted by any one whose lands or property are sought to be appropriated to the uses of the corporation, under the laws authorizing the taking of private property for public use. The legal existence of a corporation authorized to construct a railroad is at the foundation of the right to take property for its use."

However, if a company has once acquired the franchise of condemning land by complying with the statutory conditions, it will not lose the franchise merely by doing acts which would enable the State to deprive it of the franchise by obtaining a judgment of ouster.² The State may waive the right to annul a franchise on account of wrongful acts or breaches of condition on the part of the grantee; and unless a franchise by the express terms of the grant is made to expire at a specified time, it will continue until the cause of forfeiture has been judicially ascertained.³

§ 769. *The Validity of Corporate Acts performed under a Charter obtained by Fraud.* — A contract or grant induced by the fraud of either party is voidable, but not void; and it can be avoided only by the innocent party.

v. Columbus, &c. Ry. Co., 83 Ill. 348; *Buncombe Turnpike Co. v. McCarson*, 1 Dev. & B. 306; *Farnham v. Delaware, &c. Canal Co.*, 61 Pa. St. 265; *Schroeder v. Detroit, &c. Ry. Co.*, 44 Mich. 387.

¹ *Re Brooklyn, &c. Ry. Co.*, 72 N. Y. 245, 249. The charter of the corporation in this instance ex-

pired on non-performance of the prescribed condition, no judgment of forfeiture at the suit of the State being necessary. See *infra*, § 1005.

² See *Western Pennsylvania R. R. Co.'s Appeal*, 104 Pa. St. 399; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106.

³ *Infra*, § 1015.

The same principle has been applied to grants of corporate franchises obtained through a fraud practised upon the legislature. A charter of incorporation obtained by fraud is not absolutely void, but remains valid until the State has elected to set it aside; and the rescission must be declared judicially, in a proceeding instituted for that purpose by the proper government officer. It follows, therefore, that the validity of acts performed by a regularly constituted corporation cannot be impeached by showing that its charter was obtained by a fraud upon the legislature,¹ or that the persons who obtained the charter or formed the corporation conspired to accomplish an unauthorized and illegal purpose.²

If a person was induced by fraud to become a shareholder in a corporation, he may set up this fraud as a defence to an action brought by the company to enforce his stock liability; but he will remain a shareholder, and subject to the liabilities of a shareholder, until he has elected to avoid his contract.³

It is well settled that it is no defence to an action brought by or against a corporation, that it has been guilty of acts of misfeasance or nonfeasance on account of which the State might obtain a judgment of forfeiture and dissolution.⁴

¹ *Charles River Bridge Co. v. Warren Bridge Co.*, 7 Pick. 344; *Minor v. Mechanics' Bank*, 1 Pet. 66; *Kayser v. Bremen*, 16 Mo. 88; *Centre, &c. Turnpike Co. v. McConaby*, 16 S. & R. 140; 1 P. & W. 426; *Pattison v. Albany Building, &c. Ass.*, 63 Ga. 373; *Niemeyer v. Little Rock, &c. Ry. Co.*, 43 Ark. 111; *German Ins. Co. v. Strahl*, 13 Phila. 512.

² *Aurora, &c. R. R. Co. v. Lawrenceburgh*, 56 Ind. 80, 87; *National Docks Ry. Co. v. Central R. R. Co.*, 82 N. J. Eq. 755, overruling 81 N. J. Eq. 475; *Niemeyer v. Little Rock, &c. Ry. Co.*, 43 Ark. 111; *Importing, &c. Co. v. Locke*, 50 Ala. 382; and see *supra*, § 758.

³ *Supra*, § 94.

⁴ In *Kayser v. Bremen*, 16 Mo. 90, the court said: "It cannot be shown, in defence to a suit of a corporation, that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or non-user. Advantage can only be taken of such forfeiture by process on behalf of the State, instituted directly against the corporation, for the purpose of avoiding its charter, and individuals cannot avail themselves of it in collateral suits, until it be judicially declared." The above was quoted by Justice Swayne in *County of Macon v. Shores*, 97 U. S. 277. See also *Atherton v. Sugar Creek, &c. Turnpike Co.*, 67 Ind. 384.

§ 770. When Proof of the Existence of a Corporation is necessary. — In considering whether proof of the existence of a corporation is necessary in order to establish a cause of action or a defence, it is important to bear in mind the difference between the actual existence of the corporation and the legality of the formation and existence of the corporation. In many cases in which the actual existence of a corporation is essential to a cause of action or defence, the legal right of the corporation to exist is wholly immaterial. Thus, proof of the creation of a contract with a corporation would necessarily involve proof that the corporation was actually in existence at the time when the contract is alleged to have been made;¹ but it would not necessarily involve proof of the legal right of the corporation to exist and enter into the contract. A corporation having no legal right to exist and contract may nevertheless enter into a contract, and such contract may be legally enforceable.²

It is clear that the prosecution of a suit by or against a corporation necessarily implies that the corporation is in existence *de facto* at the time. A suit by or against a non-existing corporation is as impossible, in the nature of things, as a suit by or against a non-existing person. Whether a corporation or an individual really in existence be legally competent to sue, involves a different question.

If a corporation is dissolved after having entered into a contract, the benefit of the contract will be preserved in equity for the individual members and creditors of the association; but a suit upon the contract can no longer be maintained in the name of the corporation, since the association of the shareholders has been dissolved, and the corporate organization has entirely ceased to exist.³ It follows, therefore, that a defendant in an action purporting to be brought

¹ *Supra*, § 746.

² *Supra*, § 750. In a suit against a subscriber for shares in a corporation to recover calls, proof of the legal incorporation of the plaintiff is often necessary. See *supra*, §§ 737-739.

³ In some of the States statutes have been passed providing that corporations shall continue in existence for the purposes of winding up during a specified period of time after their dissolution. See *infra*, § 1036.

by a corporation upon a contract made with it may always deny the existence of the corporation. If the corporation was not in existence at the time that the contract is alleged to have been entered into, it follows necessarily that the contract was never made with it; and if the corporation was not in existence at the commencement of the suit, it is clear that the suit could not have been instituted by it. If a corporation is dissolved during the pendency of a suit brought by or against it, the suit will abate.¹

§ 771. *Misnomer of an existing Corporation immaterial.* — It should be observed, however, that an existing person or corporation may contract, and sue and be sued, under a wrong name; and the name so assumed may be the name of a non-existing corporation. Under these circumstances, the contract may be binding, and the suit may be prosecuted to a judgment valid against the real party intended, notwithstanding the misnomer.² Whether the use of the name of a non-existing corporation is a mere misnomer of an existing corporation, or an attempt to indicate an association which does not in fact exist, is ultimately a question of intention.

§ 772. *Pleading.* — *How the Existence of a Corporation can be put in Issue.* — The general rule is, that a party desiring to establish a cause of action or a defence must allege and prove every fact constituting the cause of action or defence. The production of evidence to prove a fact which has been alleged may, however, be dispensed with, by a constructive admission of the fact by the opposing party, resulting from the established rules of pleading.

¹ *Dobson v. Simonton*, 86 N. Car. 492; *Re Norwood*, 32 Hun, 196; *McCulloch v. Norwood*, 58 N. Y. 562; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Sturgis v. Drew*, 11 Hun, 136; *Clay Township v. Buchanan District*, 63 Iowa, 188; *Eagle Chair Co. v. Kelsey*, 23 Kans. 632; *Hoereth v. Franklin Mill Co.*, 80 Ill. 151; *Kelley v. Mississippi Cent. R. R. Co.*, 2 Flipp. 581; *Thornton v. Marginal Freight Ry. Co.*, 128 Mass. 82.

A corporation does not cease to exist merely because it has abandoned its business, but may still sue and be sued. *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247. Nor does its existence cease because it has been enjoined from exercising its franchises and deprived of its property. *Kincaid v. Dwinelle*, 59 N. Y. 548. See *infra*, § 1010.

² See *supra*, § 355. *Bank of Havana v. Magee*, 20 N. Y. 355.

In the Federal courts, it is held that the existence of a foreign or domestic corporation can be put in issue only by a special plea in bar or abatement. If the defendant in an action of assumpsit purporting to be brought by a corporation merely pleads the general issue, it is held that the existence of the plaintiff is constructively admitted, and no evidence to prove the fact is necessary.¹

The Code of Civil Procedure of New York provides that, "In an action brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation."²

§ 778. A judgment purporting to be obtained against a corporation which is not in existence at least *de facto* would be legally void and ineffective, unless the use of the corporate name was a misnomer of an existing party.³ It has been a debated question how the existence of a corporation against which a suit purports to be brought can be put in issue so as to obtain a judicial determination of the fact. The authorities bearing upon this point were reviewed by Hammond, J., in *Kelley v. Mississippi Central Railroad*,⁴ and it was held in that case that persons upon whom process directed against a

¹ *Union Cement Co. v. Noble*, 15 Fed. Rep. 502; *Society, &c. v. Pawlet*, 4 Pet. 500; *Conard v. Atlantic Ins. Co.*, 1 Pet. 450; *Kelley v. Mississippi Cent. R. R. Co.*, 2 Flipp. 581.

In some of the States, it is held that the existence of the plaintiff suing as a corporation could, at common law, be put in issue by a plea of the general issue. In other States, it is held that a special plea would be necessary. The matter is now generally regulated by statute.

² N. Y. Code of Civil Procedure, § 1776.

Section 1775 of the New York Code of Civil Procedure provides that, "In an action brought by or

against a corporation, the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and if the latter, the State, country, or government by or under whose laws it was created. But the plaintiff need not set forth or specially refer to any act or proceeding by or under which the corporation was created."

³ *Supra*, § 770. *Kelley v. Mississippi Cent. R. R. Co.*, 2 Flipp. 581; *Thornton v. Marginal Freight Ry. Co.*, 128 Mass. 82.

⁴ *Kelley v. Mississippi Cent. R. R. Co.*, 2 Flipp. 581, 589, 590.

corporation had been served as agents of the alleged corporation could individually plead in abatement that the corporation was not in existence, it having been dissolved. The learned judge said: "The only question to be now determined is, whether the persons named in the marshal's return shall be allowed to plead. The question here raised usually arises in some collateral way, and when it has been directly presented, as in this case, the courts are always beset with technical difficulties. On the one hand, it is urged that a dead party cannot speak; that a non-existing thing cannot, without admitting the very question in dispute, plead in the manner it might if it did exist; while on the other it is said with equal force, that one not a party to a suit cannot be heard to interfere with it. . . . The objections suggested against any method of making the defence come from pressing too far the doctrine that a corporation has an independent existence. This *ens rationis* called a corporation is, after all, only an incorporeal defendant, and it cannot, until its existence is established, have any independent status separate and apart from the personality of those composing it. To speak of it as dying, is a somewhat false analogy. The law provides heirs, executors, or administrators for dead persons; but an extinct corporation must be represented by the individuals who originally composed it; they may employ attorneys, and, as a matter of fact, they are the real actors in any litigation with it; if it be alive, they must act in the corporate name; if extinct, they may so act, although it would be an inconsistency, or they may act in their own names. . . . The plaintiff having treated the persons served with process as representing the alleged corporation, he cannot preclude them at least from denying that there is such a corporation. Whether they do this in their own names or that of the alleged corporation is quite immaterial, but it seems to me more reasonable not to pretend that there is a corporation in order to deny that there is one."¹

¹ If the point in issue is the consistency in admitting the existence legality of an actually existing corporation, there would be no inconsistency in admitting the existence of the corporation and denying that its existence was legal.

§ 774. *Proof of the Existence of a Corporation by Admission of the Opposing Party.* — The existence of a corporation may be shown by evidence of an admission of the fact by the opposing party. If a person professes to enter into a contract or other dealing with a corporation, he thereby admits that the corporation is in existence. Proof that a person has ostensibly entered into a contract or other dealing with a corporation is, therefore, *prima facie* proof as against such person that the corporation was in existence, *de facto* at least, at the time of such dealing, and the presumption would be that the association continued in existence, in the absence of evidence to the contrary.

*Jones v. Cincinnati Type Foundry Company*¹ was a suit brought by a corporation upon a note executed to it in its corporate name. The defendant answered that the plaintiffs had not legal capacity to sue because not a corporation. But the court held that production of the note was sufficient evidence to warrant a judgment for the plaintiffs, no other evidence having been offered. Perkins, J., said: "As a general proposition, it is the law of this State that a contract with a party as a corporation estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such. . . . In New York, to work such

¹ *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 90. See also *Johnson v. Gibson*, 78 Ind. 282; *Brown v. Scottish American Mortgage Co.*, 110 Ill. 235; *Mix v. National Bank of Bloomington*, 91 Ill. 20; *Ryan v. Martin*, 91 N. Car. 464; *French v. Donohue*, 29 Minn. 111; *Johnston Harvester Co. v. Clark*, 80 Minn. 808; *Wilson Sewing Machine Co. v. Spears*, 50 Mich. 534; *Studebaker, & Co. Manuf. Co. v. Montgomery*, 74 Mo. 101; *Real Estate Savings Inst. v. Fisher*, 9 Mo. App. 593.

In *Williams v. Cheney*, 8 Gray, 215, 220, it was held that, in an action against the maker of a prom-

issory note executed to a corporation, as payee, by its corporate name, the production of the note duly indorsed to the plaintiff was sufficient evidence that the corporation was duly organized, and competent to transact business, if these facts were not denied in the defendant's answer. Bigelow, J., said: "The defendants, by giving their notes to the corporation in their corporate name as payees, admitted their legal existence and capacity to make and enforce the contracts declared on, so far, at least, as to render proof on that point unnecessary in the opening of the plaintiff's case." *Topping v. Bickford*, 4 Allen, 120.

estoppel, it has been held necessary that the contract should state that the party contracted with was a corporation. But this rule does not prevail in other States. It has not been acted upon in this State.¹ If the style by which a party is contracted with is such as is usual in creating corporations, viz. naming an ideality, but disclosing that of no individual, as is usual in the cases of simple partnerships, it has been treated as *prima facie*, at least, indicating a corporate existence. . . . But in this class of cases it would seem, after all, that the courts have proceeded upon a rule of evidence rather than the strict doctrine of estoppel. They have treated the contract with a party by a name implying a corporation really as evidence of the existence of a corporation, more than as an estoppel to disprove such fact."

A recital in a deed, that the grantor or grantee is a corporation, is an admission of the fact by the parties to the deed, and is *prima facie* evidence against them.²

An association which acts as a corporation, or assumes a corporate name, thereby admits that it is a corporation, and this admission may be used as *prima facie* evidence against it.³

§ 775. *Presumption of Continuance of Corporate Existence.*—If a party, upon whom the burden of establishing the existence of a corporation rests, has proven that the corporation was once in existence, it will be presumed that the corporation has continued to exist, unless there be some reason for holding the contrary.⁴

¹ Compare *Williams v. Bank of Michigan*, 7 Wend. 540; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Black River, &c. R. R. Co. v. Clarke*, 25 N. Y. 208. *School Board*, 72 Ind. 189; *Indianapolis Sun Co. v. Horrell*, 58 Ind. 527; *Ramsay v. Richmond, &c. R. R. Co.*, 91 N. Car. 418; *Stanly v. Richmond, &c. R. R. Co.*, 89 N. Car. 331.

It has been held that the use of a corporate name, as, for example, "First National Bank of Crawfordsville," is sufficient, in a pleading, to indicate that a corporation is intended, and that it is not necessary to allege the incorporation specifically. *Sayers v. First Nat. Bank*, 89 Ind. 280; *Mackenzie v. Edinburg*

² *Provident Inst. for Savings v. Burnham*, 128 Mass. 458; *German Bank v. Stumpf*, 6 Mo. App. 17.

³ *Real Estate Savings Inst. v. Fisher*, 9 Mo. App. 593.

⁴ *Darrell v. Hilligoss, &c. Road Co.*, 90 Ind. 264; and see the cases cited in the preceding sections.

§ 776. **Strict Proof of the Existence of a Corporation.** — Proof of an admission of the existence of a corporation would merely be sufficient to establish a *prima facie* case against the party making the admission; an extrajudicial admission of a fact does not, as a rule, prevent the party making the admission from disputing the fact admitted.

In order to establish the existence of a private corporation by strict proof of the fact, it is necessary to prove the fundamental agreement by which the corporate association is created, by its several members. Proof of an attempt to form some sort of an association is not sufficient to establish the existence of a corporation *de facto*.¹ It must be shown that a corporate association was in fact perfected; and this involves proof of the essential terms of the agreement of association. As a rule, therefore, the existence of a corporation *de facto* cannot be established by strict proof of the fact, without showing a charter or articles of incorporation of some kind, which the members of the association have agreed to adopt, or under which they have organized.

In order to prove the existence of a corporation *de jure*, i. e. a corporation having a legal right to exist, it is necessary to prove, not only the existence of the corporation *de facto*, but also the legislative authorization of its existence. A public law authorizing the formation of a corporation will be judicially recognized without proof; but proof would be necessary to establish that a corporation was formed pursuant to the law, and that any conditions precedent to the legal right of forming a corporation have been fulfilled.²

§ 777. **Strict Proof of Existence of a Corporation *de facto*.** — It has often been decided, that the existence of a corporation *de facto* may be established by showing (1.) a charter or general law under which a corporation might have been formed, and (2.) an attempt to form a corporation, and the actual performance of corporate acts, pursuant to the charter or law.³

¹ See *Kirkpatrick v. United Presbyterian Church*, 63 Iowa, 372.

² See *supra*, §§ 26-30.

³ *Augusta Manuf. Co. v. Ver-*

In many of the cases it is said that the existence of a corporation *de facto* cannot be established without showing some charter or law under which the corporation might have been lawfully formed, though proof that the corporation was duly formed pursuant to the law, and that conditions precedent to the right of forming a corporation have been complied with, is unnecessary. Thus, in *Methodist Episcopal Church v. Pickett*,¹ Selden, J., said: "It has been repeatedly held that, as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*. This cannot be done by simply showing that they have acted as corporations for any period of time, however long. Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz.: 1. The existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and, 2. A user, by the party to the suit, of the rights claimed to be conferred by such charter or law. . . . The rightfulness of its existence not being in issue, of course evidence of any irregularities or defects in its organization, short of such as would show a want of good faith on the part of those concerned in the proceedings, would be wholly irrelevant. If the law exists and the record shows a *bona fide* attempt to organize under it, very slight evidence of user beyond this is all that can be required."

§ 778. This language indicates a confused use of words. It is certain that a corporation can, as a matter of fact, be created and exist without any charter or legislative authorization, and without any attempt to obtain a charter or legislative authorization. The creation and existence of the corporation under these circumstances would undoubtedly

trees, 4 Lea (Tenn.), 75; *State v. N. Y. Super. Ct. 463, 474, affirmed Shaw, 92 N. Car. 768; and see cases 69 N. Y. 518; United States Bank v. supra, § 750 et seq. Stearns, 15 Wend. 314; Williamson*

¹ *Methodist Episcopal Church v. v. Kokomo Building, &c. Ass., 89 Pickett, 19 N. Y. 482, 485, 486. Ind. 389.*

See also *De Witt v. Hastings, 40*

be prohibited by the common law and illegal, but it would, nevertheless, be a fact. If, then, a corporation "*de facto*" means a corporation actually in existence, but having no legal right to exist, it is difficult to perceive how proof of a charter or general incorporation law, and a *bona fide* attempt to form a corporation in pursuance thereof, can be essential in order to establish the existence of a corporation *de facto*.

The apparent meaning of the language used in these cases is, that the existence of a corporation *de facto* will not be recognized by the courts, or its contracts and dealings given legal effect, unless two conditions concur: there must be a law under which a corporation might have been legally formed, and there must have been an attempt to form a corporation in pursuance of the law. Proof of these facts would therefore be superadded to the proof of the actual existence of the corporation, in an action founded upon a contract or other dealing to which such corporation was a party.

It is undoubtedly true, that proof of a charter or general incorporation law, and of the desire and intention to form a corporation in pursuance thereof, is in nearly every instance necessary in order to establish the existence of a corporation *de facto*; but the reason of this is, that corporations *de facto* are in almost all cases formed by an attempt to obtain the benefit of some charter or act of incorporation, and proof of the attempt to obtain the benefit of the law by complying with its conditions is material only for the purpose of showing the actual existence and character of the corporation. It is submitted that the validity of corporate acts, performed by an association created and existing without authority of law, cannot be helped by the fact that the association might have acquired a legal right to form a corporation, and exercise corporate powers, by complying with certain conditions prescribed by statute, if the association did not in fact do so. Whether the association did or did not obtain the benefit of the statute by complying with the statutory conditions, would in nearly every instance be a matter of public record; there would

therefore be no ground for invoking the doctrine of estoppel.¹

¹ See *supra*, § 692.

In *Heaston v. Cincinnati, &c. R. R. Co.*, 16 Ind. 279, Perkins, J., said: "We have asserted above that the issue of *nul tiel* corporation is upon the existence of a *de facto* corporation, where one *de jure* is authorized; and upon this fact rests the doctrine of estoppel to deny the existence of a corporation in certain cases. The estoppel goes to the mere *de facto* organization, not to the question of legal authority to make an organization. A *de facto* corporation, that by regularity of organization might be one *de jure*, can sue and be sued. And a person who contracts with such corporation while it is acting under its *de facto* organization, who contracts with it as an organized corporation, is estopped, in a suit on such contract, to deny its *de facto* organization at the date of such contract; but this does not extend to the question of legal power to organize. Hence, if an organization is completed where there is no law, or an unconstitutional law, authorizing an

organization as a corporation, the doctrine of estoppel does not apply." See also *Snyder v. Studebaker*, 19 Ind. 484.

If a corporation *de facto* is not a corporation *de jure*, it is not apparent how an estoppel from denying the *de facto* organization of a corporation can cure the illegality arising from the fact that it is not a corporation *de jure*. Nor is it clear how the illegality of a corporation formed without authority of law can be helped by the fact that the company might have organized legally, but did not avail itself of its opportunities.

It is submitted that proof of a *de facto* organization is essential in order to establish a contract of membership in the company; and a person may by reason of his acts be estopped from denying the actual existence of this contract. But the legality of a corporate organization depends upon a compliance with the conditions prescribed by law, and cannot be established by means of an estoppel of the parties.

CHAPTER X.

THE RIGHTS OF CREDITORS.

PART I.

THE RIGHTS OF CREDITORS OF A CORPORATION WITH
RESPECT TO ITS CAPITAL.

§ 779. **The General Rights of Creditors.** — Creditors of a corporation have the same right as creditors of an individual to enforce their claims against the property of their debtor. They may subject any legal or equitable assets belonging to the corporation to the payment of their claims.

Under the common law, the members of a corporation are not individually liable to any extent for its debts, unless there is an express provision in the company's charter creating a liability. The obligation assumed by a shareholder to contribute the amount of his shares, as capital for the common benefit, is regarded as assets belonging to the association as an entity. Creditors can obtain the benefit of this obligation only after having established their claims by judgment against the corporation.¹

§ 780. **The Capital of a Corporation is regarded as a Fund charged with the Company's Debts.** — The courts of law recognize a corporation only as an entity, without regard to its membership; the real relation between creditors of a corporation and the shareholders composing it is ignored. Obligations of the corporation are recognized only as obligations of the corporate entity, and only property of which the legal title is in the corporate name can be subjected to the payment of

¹ See *infra*, §§ 819, 820.

the corporate debts. Under the common law, the dissolution of a corporation destroys all legal remedy of its creditors.¹

In equity, however, a corporation is recognized as an association of individuals united for their common benefit, under a collective name, and the rights of creditors are adjusted accordingly.² The fund contributed or agreed to be contributed by the shareholders, as capital for the purpose of carrying on the company's business and securing its creditors, is considered as a substitute for the general liability of the shareholders for obligations incurred in a corporate capacity. The fund so contributed or agreed to be contributed is treated in equity as a trust fund charged with the payment of the corporate debts. This charge or equitable lien in favor of creditors adheres to the capital of a corporation after the company has been dissolved and deprived of its franchises; and although the legal remedies of creditors are lost under these circumstances, their right to have the benefit of the fund which the shareholders have contributed or become liable to contribute for their security will be protected.³

¹ *Supra*, § 1031.

² See *infra*, § 818.

³ In *Wood v. Dummer*, 3 Mason, 311, Mr. Justice Story said: "It appears to me very clear, upon general principles as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public as well as the legislature have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public, as the only means of repayment. During the existence of the corporation it is the sole prop-

erty of the corporation, and can be applied only according to the charter; that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it; and the stockholders

§ 781. The Capital indicated by the Charter of a Corporation is held out as Security to Parties dealing with the Company. — The rights which belong, by law, to every creditor of a corporation, whether his claim was created by contract or otherwise, are in many instances supplemented by representations and agreements on the part of the corporation and its shareholders.

The amount of the capital stock of a corporation is usually fixed at a definite sum by the charter or other instrument which has been agreed to by the shareholders as containing the essential conditions of their contract of association. It is so fixed, partly for the purpose of determining the scope of the company's business and the relative rights and obligations of its shareholders as among themselves,¹ and partly also for the purpose of obtaining commercial credit on behalf of the corporation, by indicating to the community what security has been provided for those who deal with it.²

have no rights until all the other creditors are satisfied. They have the full benefit of the profits made by the establishment, and cannot take any portion of the fund until all other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. On a dissolution of the corporation, the bill-holders and the stockholders have each equitable claims, but those of the bill-holders possess, as I conceive, a prior exclusive equity." See also *Sanger v. Upton*, 91 U. S. 60; and see *infra*, §§ 1032, 1035.

The same doctrine has been applied to limited partnerships and to joint-stock companies whose funds were equitably pledged as security for creditors in place of the personal liability of the partners or shareholders. *Infra*, § 798.

¹ See *supra*, § 137.

² In *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 305, 306,

Vice-Chancellor Sandford, in discussing the nature of the capital stock of a corporation, said: "It is the aggregate amount of the funds of the corporators who are combined together under a charter, for the attainment of some common object of public convenience or private utility. This amount is usually fixed in the act of incorporation, although we have seen, in the statutes of 1823, one exception to this practice. It is thus limited in reference to the convenience of the intended corporators, and for the information and security of the public at large. To the corporators it prescribes the amount and subdivisions of their respective contributions to the common fund, the voice which each shall have in its control and management, and the apportionment of the profits of the enterprise. To the community it announces the extent of the means contributed and forming the basis

Every person who becomes a shareholder in a corporation, and every person who deals with a corporation, understands that the fund contributed or agreed to be contributed as the company's capital shall be charged with the payment of corporate debts. It is likewise understood, where there is no express provision to the contrary, that the fund so charged shall be the only security of creditors, and that the shareholders shall not be individually liable for the corporate debts and obligations. Every contract entered into by a corporation therefore includes,—

1. An implied agreement that the company's capital shall be held and used as a trust fund equitably pledged as security for the corporate debts.¹

2. An implied representation that the company's capital has been paid in or subscribed as indicated by the company's charter, and that the fund contributed or subscribed has been preserved for the purposes for which it was provided.²

The obligations so assumed by a corporation are nominally those of the corporate entity, not of its shareholders; but it is plain that the shareholders are the real parties in interest; and this fact will be judicially recognized by compelling the shareholders to make good the security which parties dealing with the corporation are justly entitled to expect.³

§ 782. Full Power of Management is reserved to the Corporation.—Although the creditors of a corporation have an equitable claim to have the company's capital preserved as a trust fund for their security, the corporation retains full

of the dealings of the corporate body, and enables every man to judge of its ability to meet its engagements and perform what it undertakes. And when, as in most instances, the statute requires the stock to be paid in before the corporation can transact business, security to those contracting with it is thereby superadded to the information of its resources. These objects for the public benefit are sometimes defeated by fraud and deception, but

they are such as the legislature have in view in limiting the amount of capital stock, and requiring a specified sum or proportion to be paid in." To the same effect, see *per* Lumpkin, C. J., in *Hightower v. Thornton*, 8 Ga. 499, 500; *Webster v. Upton*, 91 U. S. 67, 68; *Wood v. Dummer*, 8 Mason, 811.

¹ *Curran v. State*, 15 How. 812. See *infra*, § 789 *et seq.*

² *Infra*, § 824 *et seq.*

³ See *infra*, § 818 *et seq.*

power of managing this fund in carrying on its business through its usual agents. A business corporation could not carry on business successfully, or attain the objects of its creation, without possessing a general discretionary power of dealing with and managing its property. Persons contracting with such a company must necessarily be held to contract with it in the expectation that its capital will be dealt with and managed in carrying on business according to the methods of business men, and they must know that their entire security may be lost by an unsuccessful speculation over which they have no control. A creditor of a corporation has no right to complain of any use or disposition made of the company's capital, so long as the amount of the fund is not wilfully diminished; nor has he a right to complain even of a violation of the company's charter, or an illegal use of its capital, for he is not a party to the charter contract, and has no interest in the company's franchises. And even if the use or disposition of the capital of a corporation will impair the security of its creditors, a court of equity will refuse, for reasons of general expediency, to interfere at the suit of a mere creditor, unless substantial injustice would result from a failure to grant relief. Usually, therefore, the court will not interfere with the management of a corporation at the suit of a mere creditor, unless he is threatened with irreparable loss through the fraudulent destruction of his security and the insolvency of the wrongdoers.¹

§ 783. The arguments against the interference of the courts in cases of this character were strongly stated by the Lord Chancellor in *Mills v. Northern Railway Company*.² A creditor of a limited company in that case sought to restrain the company from doing unauthorized acts, on the ground that the fund for the payment of his claim was thereby impaired; but it was not shown that the defendants were guilty of a fraudulent attempt to deprive him of his security, or that an irreparable injury was threatened. Lord Hatherley said: "So far as the case rests on the simple fact

¹ See *infra*, §§ 806, 807.

L. R. 5 Ch. 621, 627. Compare

² *Mills v. Northern Railway Co.*, *infra*, §§ 797-799.

of the plaintiffs being creditors of the company, it seems to me hardly capable of argument. Work is done for a limited company; no engagement is taken from them by way of security; no debenture or mortgage is granted by them; but the work is done simply on the credit of the company. The only remedy for a creditor in that case is to obtain his judgment, and to take out execution; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say, 'Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed, to see whether or not they are doing what is *ultra vires*, and to interfere in order that, as by a bill *quia timet*, I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment.' . . . I have never before heard — and I asked in vain for any such precedent — of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this court on the ground that he, having no interest in the company except the mere fact of being creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a court of justice, but which he was about to proceed to establish."

In *Pond v. Framingham, &c. Railroad Company*,¹ the Supreme Court of Massachusetts refused to grant relief, upon a similar application. Bigelow, J., said: "The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. . . . The court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown."

¹ *Pond v. Framingham, &c. R. R. Co.*, 130 Mass. 194.

§ 784. **To what Extent a Corporation may transfer its Assets.**—The rights of creditors of a corporation in relation to the company's capital are of a purely equitable character, and may, therefore, in all cases, be moulded according to the requirements of justice. It is wholly immaterial whether these rights be called rights *in rem* or rights *in personam*,—whether they be regarded as equitable liens attaching immediately upon the assets of the corporation but subject to be divested, or merely as equitable claims enforceable against such property as the corporation may have in case of insolvency. These are matters of definition, not of substance.

As was pointed out in the preceding section, the right of creditors is a right to the security indicated by the company's capital, subject to a general power in the company to carry on business and manage its property through its agents in the usual way. Under this power, the corporation may deal with and use its property to almost any extent, so long as it acts in good faith for the purpose of obtaining profits upon the capital invested. It may transfer any or all of its property in due course of business. If a transfer of the corporate property was made in good faith for value, all rights of existing as well as future creditors in relation to the property transferred are ended, and the price or value received for the property is substituted in lieu thereof, with respect to the rights of creditors.

§ 785. It is the undoubted right of a corporation, while continuing its operations, to distribute among its shareholders any profits upon the capital contributed.¹

Moreover, a corporation may, without violating any rights of existing creditors, diminish its assets to any extent, so long as a fund sufficient to meet their claims at maturity is set apart. Thus, upon the dissolution of a corporation, or upon winding up a company's business before a dissolution, its assets may be distributed among the stockholders, after making provision for paying the company's debts; and a corporation may at any time consolidate with another company,

¹ *Infra*, § 833.

or make a complete transfer of its business, upon providing adequate security for existing creditors.¹

However, the claims of existing creditors upon capital so distributed or withdrawn, without a substitution of anything of value in its place, would not be absolutely extinguished; existing creditors would be entitled to follow this capital, if the remaining assets should prove insufficient.² After a corporation has voluntarily distributed its capital, or allowed it to be withdrawn, it has no right to carry on business or incur new debts; to carry on business under these circumstances would be a fraud upon those dealing with it on the faith of the security indicated by its charter.³

§ 786. *Insolvency does not destroy the Power of Management.* — The insolvency of a corporation does not, *per se*, put an end to the power of the company to manage its assets, or fix the lien of creditors upon the specific property in hand. It would be productive of the greatest inconvenience to permit the creditors of a corporation to interfere with its management, upon the sole ground that the company's debts are in excess of its available assets. A corporation is authorized to continue the management of its affairs, to deal with its property, and to assign it for value in due course of business, notwithstanding its actual insolvency, so long as there is an honest intention and a reasonable expectation on the part of the company of redeeming its fortunes; and it is only when a corporation is about to defraud its creditors by waste of its assets, or when the insolvency of the company is hopeless, so that further prosecution of the enterprise would clearly be at the expense of the creditors, that the latter may interfere to protect their lien. It has accordingly been held, that a corporation which is insolvent, and unable to pay all of its creditors in full, may continue its operations and pay off debts in regular course of business, though a part of the creditors be thereby deprived of their security.⁴

¹ *Infra*, §§ 806-809. *Heman v. Britton*, 14 Mo. App. 121.

² *Infra*, § 790.

³ *Infra*, § 824 *et seq.*

VOL. II. — 14

⁴ *Paulding v. Chrome Steel Co.*, 94 N. Y. 334, 338; *Pond v. Framingham, &c. R. R. Co.*, 130 Mass. 194; *Catlin v. Eagle Bank*, 6 Conn.

§ 787. *Duties of the Agents of an Insolvent Corporation to Creditors.*—A corporation which has voluntarily ceased to carry on business, or whose right to use the corporate funds for business purposes has expired, continues to hold its assets subject to the equitable claims of its creditors. If the company's assets have been reduced so that no surplus would remain after paying its creditors, it is apparent that its shareholders would have no further interest in the assets remaining; *their* equitable rights upon the corporate property would be wholly superseded by the equitable rights of creditors. The equitable claim of creditors would be fixed upon *all* the company's assets, as an equitable charge or lien.

The *legal* ownership of the assets of a corporation is not altered by the company's insolvency, and the regular agents of the company would still have the power of representing it, and managing its property, for all authorized purposes. But the equitable interests of the shareholders and creditors are altered by the insolvency; and the directors or managing agents, who originally stood in a fiduciary relation to the

238; *Savings Bank v. Bates*, 8 Conn. 506; *Bishop v. Brainerd*, 28 Conn. 801; *Hoyt v. Shelden*, 3 Bosw. 269; *Carey v. Giles*, 10 Ga. 9; *Curtis v. Leavitt*, 15 N. Y. 10, 108, 188, 198; *State v. Bank of Maryland*, 6 G. & J. 219, 220; *Lamb v. Laughlin*, 25 W. Va. 800, and cases cited.

In *Pondville Co. v. Clark*, 25 Conn. 97, which was an action by a corporation upon a note given by one of its stockholders in payment of his stock subscription, it was held that the stockholder might set off a debt due him by the company, although the company was insolvent at the time. Storrs, J., said: "The mere insolvency of the plaintiffs, using that term in its ordinary sense to denote generally an inability to pay their debts, would not prevent them from pay- ing the debt due the defendant, in preference to any other of their debts, or of applying it towards the payment of the plaintiffs' claim, or of making any other arrangement for the liquidation of their indebtedness which they chose, in the same manner as if they were solvent; and it might equally be collected of them by a suit in favor of the defendant, or by a set-off in a suit brought by them against him, or it might be factorized by the defendant's creditors. The occurrence of such insolvency would not take away or at all impair their previous power to manage their affairs, nor would it convert, of itself, their property into a trust fund for the benefit of their creditors." See also *Goodwin v. McGehee*, 15 Ala. 246-248.

company,¹ become placed in a fiduciary relation to its creditors. The powers of management vested in the directors of an insolvent corporation which has ceased to carry on business, are solely powers to manage the assets in trust for its creditors and for their benefit. It has been held, therefore, that the directors of an insolvent corporation are bound to manage the remaining assets with strict regard for the interests of its creditors. They cannot give away property gratuitously, or sell it at a sacrifice in the interest of others, even with the consent of the shareholders, or in any manner use their powers for the purpose of obtaining an advantage to themselves.²

Directors of an insolvent corporation who have claims against the company as creditors must share ratably with the other creditors in a distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors, by using their powers as directors for that purpose. These powers are held by them in trust for all the creditors, and cannot be used for their own benefit.³

It is to be observed, however, that a person who is a creditor of an insolvent corporation is not deprived of any of his rights as creditor by the fact that he also occupies the position of director of the company. He is merely incapacitated

¹ *Supra*, § 516.

² *Bradley v. Farwell*, 1 Holmes (U. S.), 433; *Drury v. Cross*, 7 Wall. 299; *Jackson v. Ludeling*, 21 Wall. 616; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *San Francisco, &c. R. R. Co. v. Bee*, 48 Cal. 398; *Smith v. Lansing*, 22 N. Y. 521. Compare *Hope v. Valley City Salt Co.*, 25 W. Va. 789.

The same rule is applicable to the treasurer and other managing agents having the corporate assets in their control. *Taylor v. Taylor*, 74 Me. 582.

³ *Bradley v. Farwell*, 1 Holmes, 433; *Hopkins's Appeal*, 90 Pa. St.

69; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Smith v. Lansing*, 22 N. Y. 521; *Corbett v. Woodward*, 5 Sawy. 403; *Stout v. Yaeger Milling Co.*, 13 Fed. Rep. 802. *Contra*, *Planters' Bank v. Whittle*, 78 Va. 737; *Whitwell v. Warner*, 20 Vt. 425; *Buell v. Buckingham*, 16 Iowa, 284, 296. Compare *Lamb v. Laughlin*, 25 W. Va. 300.

Directors must at their peril take notice of the company's financial condition in dealing with its assets. *Corbett v. Woodward*, 5 Sawy. 403; *Jones v. Arkansas Mechanical, &c. Co.*, 38 Ark. 17.

as director from using any of the powers of his position for his own benefit or the benefit of his co-directors.¹

§ 788. The general principles underlying this doctrine were stated clearly by the Supreme Court of Tennessee in *Marr v. Bank of West Tennessee*.² In that case a suit in equity was brought by a single judgment creditor of an insolvent bank, in order to have equitable assets applied in payment of his claim; but it was held that the officers of the corporation were entitled to protect the right of all the creditors to an equal distribution of the company's funds. Milligan, J., delivering the opinion of the court said: "By the insolvency of the bank, the corporation is rendered incapable of pursuing the objects for which it was created, without defrauding the public and existing creditors. Its officers or agents properly ceased to use its franchises after the insolvency was ascertained; but their responsibility as to the assets did not cease. They continued to hold them as before; not for themselves or for the use and benefit of the stockholders, but for the creditors of the corporation. . . . After the insolvency of the corporation, although the legal ownership of the assets may continue as before, the beneficial interest of the stockholders clearly no longer exists. A state of insolvency presupposes that the capital stock and assets are insufficient to meet its liabilities. The stockholders, having incurred no personal liability for the debts of the corporation, have, in point of fact, no interest in the disposition of the assets of the bank after its insolvency. In equity, as well as at law, the beneficial interest therein belongs to the creditors. The capital is the fund they trusted, and to which, with the after-acquired property or assets of the corporation, they can alone look for indemnity. Both stand pledged for the payment of the corporation debts, and a court of equity will follow them into

¹ See *Craig's Appeal*, 92 Pa. St. 396.

The incapacity of a director who is liable as a shareholder to set off claims against the company in discharge of his liability as share-

holder, is the result of his obligation as shareholder, and not as director.

See *infra*, § 861. Compare *Holland v. Heyman*, 60 Ga. 174.

² *Marr v. Bank of West Tennessee*, 4 Coldw. 471, 484.

the hands of stockholders or other persons receiving them with notice for the benefit of the creditors. From this view of the case, it seems to follow as a necessary consequence, after the admitted insolvency of the bank and the non-use of its franchises, that the officers or agents of the corporation in whose hands the assets remain hold them as *quasi trustees* for the creditors, and as such may defend the right and title thereto of all the creditors or *cestui que trusts*."

§ 789. *Right of Creditors to follow Capital withdrawn after Insolvency.* — A corporation cannot give away its property or transfer it, unless in good faith for value, if its creditors would thereby be left unsecured. If the assets of a company are not more than sufficient to secure the claims of its creditors, any further transfer of assets, unless made in good faith for value, is in excess of the powers of management to which the creditors must be held to have assented; and in such case the lien of creditors will not be divested by the transfer, and may be enforced in equity against the property until it has reached the hands of a *bona fide* purchaser for value. Thus, *Wood v. Dummer*¹ was a suit in equity brought by the unpaid creditors of a bank against its shareholders, upon the ground that the bank, while insolvent, had divided three fourths of its capital stock amongst the defendants, leaving the plaintiff's claims unpaid. Justice Story decided that the defendants were liable to refund so much of the assets received by them as was necessary to satisfy the outstanding debts of the bank, basing his decision upon the ground that the capital stock was a trust fund, pledged for the payment of the company's debts. "If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any persons having notice of the trust attaching to it. As to the stockholders themselves, there can be no pretence to say, both in law and in fact, they are not affected with the most ample notice."²

¹ 3 Mason, 308.

15 How. 307; *Railroad Co. v. How-*

² *Wood v. Dummer*, 3 Mason, 308, 311. See also *Curran v. State*, 7 Wall. 392, 409; *Union Nat. Bank v. Douglass*, 1 McCrary, 86;

§ 790. *Right of Creditors to follow Capital withdrawn before Insolvency.* — The equitable claims of the creditors of a corporation attach upon the entire capital owned by the company, and these claims cannot be divested from any portion of the capital by any distribution among the shareholders or voluntary transfer without receiving value in return. Capital distributed among the shareholders, or otherwise voluntarily diverted from the corporate uses without substituting anything valuable in its place, would remain subject to the equitable claims of *existing* creditors, even though the corporation may not have been rendered insolvent by such transfer. If the claims of existing creditors are duly paid out of the remaining assets, they would of course have no occasion to enforce their equities against the capital transferred. But creditors are entitled to *the security* of the entire capital until their claims have been paid. If a corporation should continue its business and become insolvent, after having distributed a portion of its capital among its shareholders, or otherwise transferred it without value, those creditors whose equitable claims had attached before the distribution or transfer would be entitled to follow the capital, and apply it in payment of their claims.¹

Jones v. Arkansas Mechanical, &c. Co., 38 Ark. 17; Marr v. Bank of West Tennessee, 4 Coldw. (Tenn.) 471; Wright v. Petrie, 1 Sm. & M. Ch. (Miss.) 282; Gratz v. Redd, 4 B. Monr. 178, 197; Lexington, &c. R. R. Co. v. Bridges, 7 B. Monr. 556; National Trust Co. v. Miller, 33 N. J. Eq. 155, 163; Tinkham v. Borst, 31 Barb. 407; Dabney v. Bank of South Carolina, 8 S. Car. 124; Hollister v. Hollister Bank, 2 Abb. App. Dec. 367; Gillet v. Moody, 8 N. Y. 479; Bartlett v. Drew, 57 N. Y. 589; Reid v. Eatonton Manuf. Co., 40 Ga. 98, 104; Bank of St. Mary's v. St. John, 25 Ala. 566.

The same rule has been applied to English joint-stock companies.

See *Re National Funds Ass. Co.*, L. R. 10 Ch. Div. 118; Rance's Case, L. R. 6 Ch. 104. As to distribution of profits, see *infra*, § 888.

¹ In *Union Nat. Bank v. Douglass*, 1 McCrary, 86, Love, J., said: "Surely, if the law permitted the stockholders of a corporation to pay up their stock, and then appropriate an equal amount of the assets before the payment of debts, it would open the way to the universal insolvency of corporations. Such a doctrine would give absolute impunity to fraud upon the creditors of corporations, and utterly discredit them in the financial world. The truth is, that it makes no

§ 791. **Transfer of Assets to another Company.** — The same rule applies if a corporation, without providing for its creditors, should transfer its property to another corporation, unless the latter is a purchaser for value; the corporation receiving the transfer would in that case be liable to the unpaid creditors to the extent of the property received without value. It would be immaterial whether the corporation receiving the property was a stranger to the transferring company, or a new corporation formed by the shareholders of the transferring company to supersede the latter in business, or a corporation formed as the result of a consolidation. In either event the unpaid creditors would be entitled to set aside the transfer so far as it was a fraud upon their rights.¹ If the corporation receiving the transfer was controlled by the same persons as the company executing it, or if the real parties in interest in both companies were substantially the same, the burden of showing that the transfer was made in good faith, for value, would fall upon those asserting its validity against unpaid creditors.²

§ 792. **The Effect of the Creation of Debts by a Corporation without the Receipt of Value.** — Upon the same ground, it follows that a corporation cannot indirectly deprive its creditors of the security to which they are justly entitled, by executing certificates of indebtedness, or a mortgage on its property, to persons from whom it has not received a valuable consideration in return. The holders of the securities so issued would

difference whatever whether a corporation is solvent or insolvent, so far as the doctrine is concerned, that the property is a trust fund, which cannot be withdrawn or appropriated by the stockholders until the debts are paid."

¹ *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *Hibernia Ins. Co. v. St. Louis, &c. Transp. Co.*, 3 McCrary, 368; s. c. 13 Fed. Rep. 516; *San Francisco, &c. R. R. Co. v. Bee*, 48 Cal. 398; *Barclay v. Quicksilver Mining Co.*, 9 Abb. Pr. n. s. 283; 6 Lans. 25; *Booth v.*

Bunce, 33 N. Y. 139; *Mitchell v. Beckman*, 64 Cal. 117.

In *Hibernia Ins. Co. v. St. Louis, &c. Transp. Co.*, *supra*, it was held that the unpaid creditors could, by bill in equity, recover a money judgment against the company, which had received the assets without paying value, although they had not established their claims by obtaining judgments at law. Compare *infra*, § 954 *et seq.*

² *Jones v. Arkansas Mechanical, &c. Co.*, 38 Ark. 17. See *infra*, § 812.

not be entitled to share with the *bona fide* creditors in a distribution of the company's assets, even although their claims be valid as against the corporation by reason of the unanimous consent of its shareholders. They would only be entitled to payment out of a surplus remaining after the *bona fide* creditors have been paid.¹

If, however, securities so issued are of a negotiable character, and have passed into the hands of *bona fide* purchasers, the latter would be accorded the same rights as other creditors to share in the corporate assets. Under these circumstances, the persons who originally received the securities and caused them to pass into the hands of *bona fide* purchasers are liable to contribute to the company's assets, for the benefit of its creditors, the actual value of the securities at the time of their sale. The *bona fide* creditors of the company are thereby placed in the position which they would have occupied in regard to the amount of their security, if the securities had been properly issued and sold by the company.²

§ 798. Capital cannot be used by a Corporation to purchase Shares in itself. — A corporation may purchase shares in itself out of profits earned upon the original capital, without impairing the rights of any of its creditors. But a purchase of shares in a company out of the company's own capital would necessarily operate as a reduction of the capital to the extent of the price paid. It would be wholly immaterial whether the shares were fully paid up, and worth the price given by the company, or not. The security of creditors would necessarily be diminished until the shares have been resold by the company, although the purchase may be advantageous to the remaining shareholders by increasing their relative interests in the company. If a corporation could use its capital for the purchase of shares in itself, it might in this way practically distribute its entire capital among its shareholders, and cancel the outstanding shares, leaving creditors wholly unsecured.³

¹ National Trust Co. v. Miller, 86. Compare Keystone Bridge Co. 83 N. J. Eq. 155. v. Barstow, 8 Mo. App. 494.

² Skrainka v. Allen, 76 Mo. 384, affirming 7 Mo. App. 434; Union Nat. Bank v. Douglass, 1 McCrary, 33; and see *supra*, § 112. It has been held that, where a cor-

It follows, that, if capital of a corporation is used in purchasing shares in itself, existing creditors would be entitled to recover the amount so used, if the company should prove insolvent, as in any other case of a withdrawal of capital.¹ And after such purchase, the company and its officers and shareholders could not obtain credit upon the faith of the security indicated by their charter, without committing a fraud upon the parties dealing with them.²

§ 794. *Rights of Action of Creditors on Account of a Diversion of Assets upon which their Claims have attached.*—Judgment creditors of a corporation are clearly entitled to enforce their judgments against any legal or equitable assets belonging to the corporation. This includes a right to enforce any causes of action belonging to the corporation by reason of a misappropriation of its funds or other invasion of its rights.³ Such a cause of action would be equitable assets.

Independently of this right of creditors to enforce their judgments against the assets belonging to the corporation, they are entitled in equity to such relief as is necessary for the protection of their equitable claims upon the company's capital.⁴ Thus, if the shareholders in a corporation should, by unanimous agreement, distribute its capital among themselves, or otherwise divert it from the corporate uses, leaving the corporation insolvent, the fund so diverted would,

poration becomes a holder of shares of its own stock, the individual liability of the remaining shareholders to the creditors of the company is not thereby increased proportionately. *Crease v. Babcock*, 10 Met. (Mass.) 557.

¹ *Infra*, § 841.

² The above would not apply to a purchase of shares in a company in consideration of a debt due the company which cannot otherwise be collected. Such a transaction would be beneficial to the other shareholders, and would not reduce the actual security of existing creditors. Nor could future creditors complain of a fraud,

if the capital was reduced by depreciation in due course of business. See *supra*, § 114, and *infra*, § 841.

³ Property misapplied without the consent of the corporation, and debts due the corporation, may be reached by garnishee process. *Eyerman v. Kriekhaus*, 7 Mo. App. 455; and see *infra*, §§ 819, 860 *et seq.*

⁴ "The lien of creditors of an insolvent corporation upon its assets in the hands of others (independently of rights given by statute) is a purely equitable lien, and can be enforced only in an equitable proceeding." *McLean v. Eastman*, 21 Hun, 314, *per Smith, J.*

in equity, remain subject to the rights of creditors, although the corporation might not be able to recover it. Under these circumstances, creditors would be entitled, in equity, after having exhausted the assets of the corporation, to make good any deficiency by enforcing their claims against the funds diverted;¹ and if the funds diverted have passed beyond the reach of creditors, equitable compensation to that extent would be due from the directors or other wrongdoers who caused the loss.²

§ 795. *As against the Directors.* — In applying these rules against the directors of a corporation, the positive obligations which directors owe to the corporation — that is, the body of shareholders — and to creditors must not be overlooked.

Directors are bound to use reasonable skill and the most scrupulous fidelity in managing the corporate estate for the benefit of its shareholders. For any loss resulting from a neglect to perform this obligation, the directors would ordinarily be liable to the corporation; and the cause of action belonging to the corporation would be enforced in equity for the benefit of its creditors, in case the legal assets should prove insufficient to satisfy their claims.³

The directors of a corporation are under no positive obligation to creditors, except in the event of the company's insolvency. If, however, the directors should misappropriate or divert any portion of the company's capital, and thereby cause a loss to existing creditors, they would be liable, like any other wrongdoer, to make equitable compensation.⁴

¹ *Supra*, § 789. *Bank of St. Mary's v. St. John*, 25 Ala. 566, 619. Compare *Bent v. Hart*, 78 Mo. 641; 10 Mo. App. 143. 25 W. Va. 789; *Bank of Mutual Redemption v. Hill*, 56 Me. 385; *Shultz v. Christman*, 6 Mo. App. 338.

² *Lexington, &c. R. R. Co. v. Bridges*, 7 B. Monr. 556; *Bank of St. Mary's v. St. John*, 25 Ala. 566, 610, 619; *Re National Funds Ass. Co.*, L. R. 10 Ch. Div. 118. Compare *Moses v. Ocoee Bank*, 1 Lea (Tenn.), 398; *Schley v. Dixon*, 24 Ga. 273; and see *infra*, § 835. ⁴ See *Re National Funds Ass. Co.*, L. R. 10 Ch. Div. 118; *Lexington, &c. R. R. Co. v. Bridges*, 7 B. Monr. 556; *Bank of St. Mary's v. St. John*, 25 Ala. 566. In *Alexander v. Relfe*, 74 Mo. 495, 520, the action was brought by a receiver representing creditors.

³ *Hope v. Valley City Salt Co.*,

After a corporation has become insolvent, its directors are under a positive obligation, as quasi trustees, to manage the assets in their hands with strict regard for the equitable rights of creditors; and they would be liable in equity to make good any loss to creditors, resulting from negligence or bad faith in discharging this obligation.¹

If directors of a corporation should wrongfully distribute a portion of the company's capital among the shareholders in the form of dividends, existing creditors would have a right to follow the funds so distributed;² they would also be entitled to recover compensation from the directors who were guilty of the diversion of capital. The liability of the directors would not exceed the amount of the fund improvidently distributed by them. As between the directors and the shareholders who received the fund, the latter would be primarily liable.³

§ 796. There is no relation between the creditors and directors of a corporation of which a court of law can take cognizance, nor have creditors any *legal* claim upon the corporate assets. It is evident, therefore, that a creditor cannot sue the directors at law for damages on account of an unauthorized diversion or waste of the assets by which he has been deprived of his rights. The right of the creditor to have the assets restored, or compensation made for the loss, is a purely equitable claim.⁴

§ 797. *Creditors may restrain a threatened Diversion of Assets causing irreparable Loss.*—Creditors of a corporation are entitled to the usual equitable remedies for the protection of their rights. They are therefore entitled to an injunction to restrain any threatened waste or diversion of the corporate assets which would result in the destruction of their security, *and thereby cause them irreparable loss.* If the managing

¹ *Bank of St. Mary's v. St. John*, 435; *Winter v. Baker*, 34 How. Pr. 25 Ala. 566; *Freeman v. Stine*, 15 188; s. c. 50 Barb. 432; *Zinn v. Phila.* 37, 44. *Mendel*, 9 W. Va. 580; *Fusz v. Spaunhorst*, 67 Mo. 284. See *supra*, § 568. See also *Vose v. Grant*, 15 Mass. 505.

² *Supra*, § 789.

³ See *Lexington, &c. R. R. Co. v. Bridges*, 7 B. Monr. 556, 562.

⁴ *Branch v. Roberts*, 50 Barb.

agents who are in charge of the company's assets are the persons threatening the wrong, a receiver may be appointed to take the company's property out of their hands.

Accordingly, in *Conro v. Gray*,¹ a receiver was appointed at the suit of a simple contract creditor, to prevent the agents of a corporation from committing waste and misapplication of its funds to the complainant's injury. Justice Paige said: "Horace Gray, as President of the Port Henry Iron Co., was a trustee of the creditors of the company. His assignment of the property, if it belonged to the company, was of a trust fund for the payment of its creditors. And such creditors, having claims on such fund for the payment of their debts, had a right, before proceeding to judgment and execution, to file a bill against the corporation and the assignees of Gray, to prevent a misapplication of the trust fund, and to secure its application to its legitimate uses; viz the payment of the debts of the company. And the court, to accomplish this object, may appoint a receiver, or require security for the due preservation and appropriation of the property."

§ 798. Similar equitable relief will for the same reasons be granted to creditors of a limited partnership, or of a joint-stock company whose capital has been equitably pledged as a fund for the security of creditors.

In *Innes v. Lansing*,² Chancellor Walworth held that the Court of Chancery was bound to carry into effect the principle of the statute of New York authorizing limited partnerships, "by treating the property of the limited partnership after insolvency as a trust fund for the benefit of creditors"; and that any creditor could therefore file a bill for the appointment of a receiver and a valuable distribution of the assets of such a firm, if the members of the firm failed to make the distribution themselves.

In *Kearns v. Leaf*, and *Aldebert v. Kearns*,³ a policy-holder

¹ *Conro v. Gray*, 4 How. Pr. 166. 583. See also *Whitcomb v. Fowle*, See also *Fisk v. Union Pacific R. R.* 7 Abb. N. C. 295.

Co., 10 Blatchf. 518; *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301. ² 1 H. & M. 681. In *Aldebert v. Kearns* (pp. 707, 708), Vice-Chancellor Page-Wood said: "I appre-

³ *Innes v. Lansing*, 7 Paige Ch. cellor Page-Wood said: "I appre-

in an English joint-stock company, whose funds were, by provisions in the company's deed and in the plaintiff's policy, made liable for the payment of the sums insured, (the shareholders not being personally liable,) was held to be entitled to an injunction restraining the company from transferring its assets to another company, until provision had been made for the payment of the plaintiff's claim.

§ 799. The right of a creditor to prevent waste or diversion of the assets of a corporation, and the right of a shareholder to interfere under similar circumstances, rest upon

hend that under these stipulations the policy-holders have no right to meddle with anything, wise or unwise, which the company may do in accordance with the deed. For example, if the company invest in a hazardous, or even ruinous security, the policy-holders are not entitled to interfere. It would be extremely mischievous to allow such interference. Still, the conduct of the company might reach a point of absolute waste of the assets, in contravention of the provisions of the deed, at which the right of the policy-holders to intervene might be considered to arise. . . . The principle on which the plaintiff's case is founded here is, that the fund which was held out to him as his security, and to which he has himself contributed, shall not be misapplied contrary to the provisions of the deed. He says that he comes here to prevent a waste of the assets. His position is somewhat analogous to that of a person having a contingent debt against a testator's estate, who may come into this court to prevent the estate being paid away to legatees, or wasted or thrown away by the executors. The argument of the company; as I understand it, goes this length, that the policy-holder is simply a contingent

future creditor minus the personal remedy. If that were the whole of the contract, it would be very different from what persons who insured in the company must have supposed. They could not have imagined that it would be in the power of the directors of the company to destroy all their interest under their policies, leaving them without redress until their policies should have matured by death. . . . In my opinion, the plaintiff did acquire under that contract such a species of interest in the fund as would entitle him to interfere to save the property from being wasted contrary to the provisions of the deed." See also *Evans v. Coventry*, 5 De G., M. & G. 911; *Re State Fire Ins. Co.*, 1 H. & M. 457.

The effect of the provision discharging the shareholders of the company and making its funds liable for the payment of debts seems to have been to place the company upon the same footing as an ordinary corporation in this respect. See *per* Lord Justice Turner, *In re State Fire Ins. Co.*, 11 W. R. 1012; *Grain's Case*, L. R. 1 Ch. D. 820. See also *Re National Funds Ass. Co.*, L. R. 10 Ch. Div. 118; *Rance's Case*, L. R. 6 Ch. 104; *Re Telegraph Construction Co.*, L. R. 10 Eq. 884.

entirely different grounds. The shareholders of a corporation constitute the corporation itself; they have united under the charter for their mutual benefit, and each shareholder is in equity the owner of a share of the corporate property and rights. Hence, any violation of the charter, or any unauthorized application of the corporate funds, is a violation of the equitable rights of every dissenting shareholder, and presents a ground for equitable interference.¹

A creditor, however, is not a party to the charter contract, and has no right to complain though the charter be violated or rescinded. Hence a creditor cannot interfere with the agents of a corporation; and he is not interested in the disposition made of surplus funds of the company, or in the management of its affairs, so long as the company is not insolvent, or in danger of being rendered insolvent by waste of its assets.² On the other hand, the unanimous consent of the members of a corporation would not legalize any dealing with the company's assets, in violation of the equitable lien of its creditors.³

In considering the right of a creditor of a corporation to restrain a misapplication of the company's assets, it is therefore necessary to bear in mind, —

1. A creditor cannot complain of any dealing with the corporate assets unless it be in excess of the wide powers of management retained by the corporation.⁴

2. The ordinary remedy of a creditor is by obtaining judgment and execution against the corporation, and, if necessary, by creditors' bill.⁵

3. A creditor who has not established his claim by a judg-

¹ *Supra*, Chapter V.

² *Bewley v. Equitable Life Ass. Soc.*, 61 How. Pr. 344.

³ In *Lothrop v. Stedman*, 18 Blatchf. 141, Shipman, J., said: "The principle that a stockholder of a corporation cannot maintain a bill in equity against a wrongdoer to prevent an injury to the corporation, unless it shall be averred and

shall affirmatively appear that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor."

⁴ See *supra*, § 782.

⁵ *Cole v. Knickerbocker Life Ins. Co.*, 28 Hun, 255; *Belknap v. North America Life Ins. Co.*, 11 Hun, 282.

ment against the company cannot enjoin any dealing with the company's assets, or obtain the appointment of a receiver, unless it be clear, not only that the threatened dealing would impair his equitable rights, but also that he would suffer irreparable injury if left to pursue his ordinary remedy. Interference with the management of a corporation whose business is in operation can be justified only in a strong case.

§ 800. **Creditors acquire no Claim upon Property previously transferred.** — It is clear that a corporation cannot confer a right or claim against property which it does not own. The equitable claims of creditors, therefore, can attach only upon such assets as belong to the corporation at the creation of the indebtedness, or are acquired by the company thereafter. Hence, if a corporation should incur debts and become insolvent *after* a portion of its capital stock has been withdrawn or diverted from corporate uses, creditors would not be entitled to follow the property or fund previously transferred, and hold it subject to their equitable lien, as in case of a distribution of assets made by a corporation while insolvent, and at the expense of existing creditors. Under these circumstances, creditors could not claim to have been wronged by a transfer of property made by the company while entirely solvent and before their claims arose. Accordingly, in *Graham v. Railroad Company*,¹ the Supreme Court of the United States held that a transfer of lands made by a corporation for an inadequate consideration, or by a voluntary conveyance, the company being solvent at the time and having no intent to defraud its creditors, could not be impeached by creditors whose claims arose subsequently.

§ 801. **Rights of Persons contracting with a Corporation after a Withdrawal of Capital.** — It has been pointed out, that every contract made by a corporation includes an implied representation to the party dealing with it that the capital indicated by the charter has been duly subscribed and held as a fund for the payment of creditors.² It would be a misrepresenta-

¹ *Graham v. Railroad Co.*, 102 U. S. 148. Compare *Fraser v.*

Ritchie, 8 Ill. App. 554.

² *Supra*, § 781.

tion and a fraud to obtain credit by professing to carry on business with the capital indicated by the charter of a corporation, if that capital was never in fact subscribed, or had been secretly paid back to the shareholders, or otherwise voluntarily withdrawn. The legal rights accruing to a person from whom a corporation has obtained credit under these circumstances will be considered hereafter, in treating of the obligations of shareholders.¹

§ 802. *The Power of an Insolvent Corporation to prefer particular Creditors.* — In the absence of a statutory prohibition, a corporation has the same power of making preferences amongst its creditors, in the distribution of its assets, as an individual. This has repeatedly been decided by the courts; and an assignment of all the assets of a corporation to a trustee, to pay certain creditors in full, leaving the others unpaid, will apparently be sustained both at law and in equity. In *Ringoe v. Biscoe*,² Chief Justice Watkins said: "It is now well settled that a corporation, unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, by virtue of its general power to contract, may well make an assignment of its effects, entire or partial, if made *bona fide* for the payment of its debts, the same as any natural person may do, and the corporation has the same right to make preferences among its creditors of particular creditors or classes of creditors; and such preferences, when they are meritorious, so far from furnishing an argument against the deed, conduce rather to uphold it."³

¹ *Infra*, § 824 *et seq.*

² *Ringo v. Biscoe*, 18 Ark. 563, 575.

³ To the same effect, see *Covert v. Rogers*, 38 Mich. 363; *Coats v. Donnell*, 94 N. Y. 168; *Dana v. Bank of United States*, 5 W. & S. 223; *Ex parte Conway*, 4 Ark. 348-354; *Warner v. Mower*, 11 Vt. 390; *Whitwell v. Warner*, 20 Vt. 425; *Dabney v. Bank of South Carolina*, 8 S. C. 124, 126. Compare *Barings v. Dab-*

ney, 19 Wall. 1; *Smith v. Skeary*, 47 Conn. 47.

It has been held that even shareholders and directors, who have claims against the corporation as creditors, may be preferred to other creditors in an assignment of the company's property. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Planters' Bank v. Whittle*, 78 Va. 787; *Buell v. Buckingham*, 16 Iowa, 284. Compare, however, *supra*, § 787.

§ 803. This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of a corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an equal distribution of the common security has often been recognized by the courts of equity in adjusting the rights of creditors among themselves and in relation to the company's shareholders.¹ After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors become fixed. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved by implication to the company and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property in order to carry on its business and further the purposes for which the company was formed. The purposes of a corporation are not furthered in any manner by giving it or its agents the power, after the company has become insolvent and has ceased to carry on business, and after its shareholders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest or mere whim, and to pay their claims in full, leaving the others wholly without redress.

The doctrine that an insolvent corporation may prefer certain creditors at the expense of others seems to have been first started in *Catlin v. Eagle Bank*,² a case in which the fundamental rule that the assets of an insolvent corporation constitute a trust fund pledged for the security of creditors was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and is contrary to the plainest principles of justice.³

¹ *Infra*, § 861 *et seq.*

² *Catlin v. Eagle Bank*, 6 Conn. 283.

³ This was pointed out clearly by

Chancellor Buckner in an elaborate opinion delivered in *Robins v. Embury*, 1 Sm. & M. Ch. (Miss.) 207, 258-264. See also *Richards v. New*

§ 804. **Moneyed Corporations in New York.**—A just rule was established in New York, by statute, in relation to preferences among the creditors of insolvent moneyed corporations. It was enacted, that no "conveyance, assignment, or transfer, nor any payment made, judgment suffered, lien created, or security given, by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving, by means of any such conveyance, assignment, transfer, lien, security, or payment, any of the effects of the corporation, shall be bound to account therefor to its creditors or stockholders, or their trustees, as the case shall require."¹

This act does not restrict the power of moneyed corporations to deal with their assets in due course of business. It would not prevent such a corporation, although actually unable to meet its obligations in full, from paying a debt in

Hampshire Ins. Co., 48 N. H. 268; § 9. This section was re-enacted with additional clauses by the Act of 1882, ch. 409, § 187 (Laws of 1882, p. 655).
Hightower v. Mustian, 8 Ga. 506;
Marr v. Bank of West Tennessee, 4 Coldw. 471.

An assignment of the property of a corporation for the benefit of its creditors, without preference or discrimination, would not be subject to this criticism. Such assignments have repeatedly been sustained. Shockley v. Fisher, 75 Mo. 498; De Ruyter v. St. Peter's Church, 8 N. Y. 238; 3 Barb. Ch. 124; Haxtun v. Bishop, 3 Wend. 18; Hill v. Reed, 16 Barb. 281; State v. Bank of Maryland, 6 G. & J. 219, 220; McCallie v. Walton, 37 Ga. 612; Flint v. Clinton Co., 12 N. H. 485; Pope v. Brandon, 2 Stew. 401; Allen v. Montgomery R. R. Co., 11 Ala. 451; Lamb v. Cecil, 25 W. Va. 288; Lamb v. Laughlin, 25 W. Va. 300.

In National Shoe, &c. Bank v. Mechanics' Nat. Bank, 89 N. Y. 467, Danforth, J., said: "The object and spirit of this act, undoubtedly, is to secure an equal distribution of the effects of a moneyed corporation among its creditors, in case of insolvency." Kingsley v. First Nat. Bank, 81 Hun, 329.

The act has no application to foreign corporations. Coats v. Donnell, 94 N. Y. 168.

The term "moneyed corporations" as used in the act includes every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances. Laws of 1882, ch. 409,

¹ 1 R. S. ch. 18, tit. 2, art 1, § 214.

regular course of business, or securing it by an assignment of part of its property, if its officers made the payment or assignment before a stoppage of the company's business had occurred, and in the hope that, by relieving its temporary embarrassments, it would be enabled to enter upon a more prosperous career.¹

§ 805. **National Banks.** — The National Banking Act provides that every payment of money or assignment of property of any description belonging to a national bank, after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of the assets of the bank in the manner prescribed by law, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and that no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.²

§ 806. **Creditors cannot prevent a Dissolution.** — A corporation is under no implied obligation to its creditors to continue to carry on business. Creditors of a corporation are not parties to the charter contract, nor have they any interest in the franchises granted by the State to the body of corporators. It is clear, therefore, that these franchises may be extinguished, and the corporation be dissolved, without impairing any of their rights. Justice Story, in delivering the opinion of the Supreme Court of the United States, said: "We are of opinion that the dissolution of the corporation (even supposing the act of confirmation of Congress out of the way) cannot in any just sense be considered, within the clause of the Constitution of the United States on this subject, an impairing

¹ *Paulding v. Chrome Steel Co.*, 81 N. Y. 385; 94 N. Y. 334, 338; *Dutcher v. Importers', &c. Nat. Bank*, 59 N. Y. 5; and see *supra*, § 796.

² See U. S. Rev. Stat. § 5242; *Bank of Newberne*, 81 N. Y. 385; *National Shoe, &c. Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467; *Case v. Citizens' Bank*, 2 Woods, 28; *Casey v. Société, &c.*, 2 Woods, 77; *Venango Nat. Bank v. Taylor*, 6 Biss. 301; *National Bank v. Colby*, 56 Pa. St. 14; *Wheelock v. Kost*, 77 21 Wall. 609; *Robinson v. National Ill.* 296.

of the obligation of the contracts of the company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof at the time of its dissolution, in any mode permitted by the local laws. . . . A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."¹

§ 807. Creditors cannot prevent an Alteration of the Charter. — It follows, upon the same grounds, that the charter of a corporation may be altered at any time, without the consent of the company's creditors; an alteration may properly be regarded as a rescission of the first charter, and the formation of a new corporation under a different constitution out of the members of the old company. The creditors of a corporation have no better right to complain of a change of the charter of the company, than the creditors of a partnership to complain of an alteration of the articles between the partners.² After

¹ *Mumma v. Potomac Co.*, 8 Pet. 286, 287; *Smith v. Chesapeake, &c. Canal Co.*, 14 Pet. 45; *Curran v. State*, 15 How. 810, 811; *Chicago Life Ins. Co. v. Needles*, 118 U. S. 574; *Mobile, &c. R. R. Co. v. State*, 29 Ala. 586. See also *Heman v. Britton*, 14 Mo. App. 121; *Barr v. Bartram, &c. Manuf. Co.*, 41 Conn. 506; *King v. Accumulative Life, &c. Ass. Co.*, 3 C. B. n. s. 151; *Kearns v. Leaf*, 1 H. & M. 707.

Upon the dissolution of an insolvent corporation the rights of its creditors become fixed. The holder of a policy of insurance issued by a corporation is entitled only to the value of the policy at the time of the dissolution, although the loss insured against happened shortly afterwards. *Dean's Appeal*, 98 Pa. St. 101; *Commonwealth v. Massachusetts Ins. Co.*, 119 Mass. 51.

² See *Pennsylvania College Cases*,

the dissolution of a copartnership, or a change in the business of the company, the partners remain individually liable; and after a rescission or alteration of the charter of a corporation, the capital of the company remains charged with the payment of the corporate debts. Whether the right of using and managing this fund remains in the company after its charter has been changed, is a different question. In case of a copartnership, the members of the firm are individually liable, and creditors cannot complain if the business of the company is wholly changed, and its capital devoted to other uses. The creditors of a corporation, however, cannot hold the stockholders personally responsible, and have no recourse beyond the corporate assets. It may be doubted, therefore, whether any radical change in the management of the fund pledged for their security can be effected without their consent. Thus, there would be manifest injustice in allowing a corporation chartered for the purpose of operating a railroad, or carrying on the banking business, to alter its business by becoming a mining company, or embarking in other speculative ventures, and to employ its capital for that purpose, after having borrowed money and issued its obligations under the original charter. A person might well be willing to invest money in the bonds of a railroad company, and not be willing to take the security of a corporation engaged in a more hazardous enterprise. Hence it would seem that, if a corporation should obtain an alteration of its charter, of so radical a nature that the security of its creditors would be impaired, existing creditors would be entitled to interfere and enforce their lien upon the assets, as in case of a dissolution and the formation of an entirely new corporation in place of the old. But there

18 Wall. 218-220; *Vermont, &c. R. R. Co. v. Vermont Central R. R. Co.*, 84 Vt. 1, 51. In *Grocers' Bank v. Kingman*, 16 Gray, 473, the Supreme Court of Massachusetts held that the sureties on the bond of the cashier of a bank were discharged by an increase of the capital stock of the bank, because their risk was thereby increased; but in *Eastern Railroad Co. v. Loring*, 138 Mass. 381, it was held that the sureties on the bond of a ticket-seller of a railroad company were not discharged by an increase of the capital of the company and an enlargement of the scope of the ticket-seller's duties.

can be no doubt that alterations may be made in the charter of a corporation, and the power of management of the company either enlarged or diminished, so long as the equitable lien of creditors upon the corporate funds is not impaired, and no material change is made in the nature of their security.¹

§ 808. **A Novation cannot be effected without the Consent of Creditors.**—It is well settled that a debtor cannot, without the consent of his creditor, divest himself of liability by transferring his obligation to another person. Thus, upon the dissolution of a firm, each member remains liable upon all the firm obligations; and no arrangement, unless assented to by the creditors, can discharge an outgoing partner from liability, and substitute an incoming partner in his place.² The same general rule is applicable to a transfer of the debts of a corporation. Creditors of a corporation cannot be compelled to accept the

¹ In the *Pennsylvania College Cases*, 13 Wall. 217, the question was raised whether an act consolidating two colleges, and providing that the new corporation should take the assets and should perform the obligations of each of the corporations forming it, was unconstitutional, because impairing the rights of the holders of perpetual scholarships purchased from one of the original institutions. Justice Clifford, in delivering the opinion of the court, held that the rights of holders of scholarships were not affected by an alteration in the charter of the college, and that the funds of the institution were not diverted by the consolidation (pp. 218-220). The learned judge said: "Such contracts made between individuals and the corporation do not vary or in any manner modify the relation between the State and the corporation in respect to the right of the State to alter, modify, or amend such a charter, as the power

to pass such laws depends upon the assent of the corporation, or upon some reservation made at the time, as evidenced by some pre-existing general law or by an express provision incorporated into the charter. Cases arise undoubtedly where a court of equity will enjoin a corporation not to proceed under an amendment to their charter passed by their assent, as where the effect would be to enable the corporation to violate their contracts with third persons; but no such question is here presented for the decision of the court, nor can it ever be under a writ of error to a State court. Questions of that kind are addressed very largely to the judicial discretion of the court, and create the necessity for inquiry into the facts of the case, and for an examination of all the surrounding circumstances." Compare *Hascall v. Madison University*, 8 Barb. 174.

² Lindley on Partnership (4th ed.), 485.

obligation of an individual or of another company in discharge of their original rights.¹

It has been decided, accordingly, that a policy-holder in a life insurance company, or the holder of an annuity, cannot be held to have accepted the liability of a new company in place of that with which he contracted, unless there be clear evidence of assent; and that, where an ineffectual attempt has been made to transfer the rights of such policy-holder or annuitant to a new company, he will be entitled, upon the winding up of the companies, to rank as a creditor of the original company with which he contracted. The payment of premiums to a new company is not alone sufficient to estop a policy-holder from denying the validity of a novation. Vice-Chancellor James said: "In order to constitute a novation, it must be tripartite, — the creditor, the original debtor, and the new debtor must all be parties to it. . . . It appears to me monstrous that a person having a contract of this kind is to be told that he has lost his right under his original contract, and must take such remedy as he may get from some other office, because he pays his premiums and takes receipts at the place where he is told to do so."²

§ 809. **Novation by Consolidation.** — The consolidation of several corporations involves the dissolution of each company, and the formation of a new corporation by the combined stockholders of the old. There can be no doubt that a consolidation may be thus effected at any time, without the consent of the creditors of either company; but creditors cannot be compelled to give up their equitable lien upon the assets of the particular company with which they contracted, and to take in place of it the obligation of the newly

¹ *Bruffett v. Great Western R. R. Co.*, 25 Ill. 853, 357, and see cases cited in the following notes. *can Mut. Life Ins. Co.* 45 Conn. 377; *In re Family Endowment Soc.*, L. R. 5 Ch. 132, 133; *In re India, &c.*

² *In re Manchester, &c. Assur., &c. Ass.*, L. R. 9 Eq. 648, 649. *Ass. Co.*, L. R. 7 Ch. 651; *Griffith's Case*, L. R. 6 Ch. 374; *Lindley on Partnership* (4th ed.), 463, 464. Compare *In re National Provincial L. Ass. Soc.*, L. R. 9 Eq. App. 150, 168; *Stedman v. American Mut. Life Ins. Co.* 45 Conn. 377.

formed corporation, upon an equal footing with all of its creditors.¹

Upon this principle, it was decided by the Supreme Court of New Jersey, that where a railroad company had agreed to give its bonds in consideration of a loan of money to be paid in instalments, and afterwards by legislative authority became consolidated with other companies, the contract was thereby rescinded; and no suit could be maintained by the consolidated company upon a tender of its bonds.² Chief Justice Beasley said: "Neither the court nor the legislature can alter the bargain between these parties. The defendant had a right to stipulate for the bonds of a particular company, and it is clear he cannot be required to accept, in lieu of the promised consideration, the obligation of any other company, no matter how much the latter may exceed in value the former. There is no legal mode in which the contract of a man can be improved for him against his consent. As the bond of the contracting company formed the entire consideration for the promise of the defendant, if such company have put it out of its power to render such bond to the defendant, it has destroyed this contract by its own voluntary act, and has in consequence discharged the defendant. This defence was met on the argument by the contention that the New Jersey, Hudson, and Delaware Railroad Company had not ceased to exist, but had merely changed its name, and, in a manner, the form of its organization. But this view appears to me very unreasonable. The consolidated companies, in the nature of things, cannot be the same as one of their constituents. Such a company has larger purposes, wider powers, and heavier responsibilities than those inherent in either of its component parts."³ Upon the same principle, it has been held that, upon the consolidation of a fire insurance company with another company engaged in the same business, the policy-holders in either company cannot be compelled to continue the payment of their premiums.⁴

¹ *Infra*, § 954.

² 85 N. J. Law, 324, 325.

³ New Jersey Midland Ry. Co. v. Strait, 35 N. J. Law, 322.

⁴ Hamilton Mutual Ins. Co. v. Hobart, 2 Gray, 543.

§ 810. **Rights of Creditors may be nominally altered without their Consent.** — In order to determine whether a transaction is in violation of the rights of creditors of a corporation, it is necessary to consider (1.) the real character of the rights of creditors, and (2.) the real effect of the transaction. Creditors cannot object to a merely nominal alteration of their rights.

What the real rights of creditors of a corporation are, can be determined only by reference to the particular charter or articles of association and laws under which the company was formed. In some cases, the only substantial right belonging to the creditors is to have the benefit of the security contributed, or agreed to be contributed, by the company's shareholders; in other cases, creditors have an additional right to charge the shareholders individually. The right of creditors to charge the shareholders individually is usually subject to a power of substitution by a transfer of the shares to other persons; in some cases, however, past shareholders are liable to creditors, like the outgoing members of a firm.¹

The substantial rights of creditors cannot be altered without their consent; but whether a transaction involves an alteration of these rights depends upon its effect, not upon its form. Thus creditors of a corporation cannot complain of a change of the name of their debtor, or of an alteration of its charter, even though the transaction amount in form to a novation by the substitution of a new debtor.²

On the other hand, a substantial alteration of the rights of creditors of a corporation cannot be effected without their consent, although the transaction may nominally amount merely to an alteration of the company's charter, without changing its identity. Thus, the security of existing creditors cannot be reduced by a reduction of the company's capital, or by a purchase or cancellation of shares; nor can creditors be compelled to share their security with the creditors of another company, whose debts the corporation has assumed by an unauthorized arrangement amounting in substance to a consolidation.

¹ *Infra*, §§ 858, 888, 890.

² See the next section.

§ 811. *Rights of Creditors after the Reorganization or Revivor of a Corporation.* — It has been pointed out, that creditors of a corporation have no right to object to an alteration of the name and constitution of the corporation, provided their security be not diminished or substantially altered. Nor can creditors object if the same consequences are brought about in the form of a reincorporation or revivor of the company under a new charter. A company may renew its corporate existence by accepting a new charter; and, if the nature of the association be not materially altered thereby, it may continue to manage its assets according to the new charter, without first obtaining the consent of creditors. The rights of creditors against the company and its assets would continue after the reorganization as before.¹

However, the term "reorganization" is generally used to indicate the formation of an entirely new corporation, for the purpose of purchasing the property of another corporation, and superseding it in business without incurring any liability to its creditors. This result can undoubtedly be accomplished without impairing the rights of creditors of the old company, even although the latter may have been dissolved by its shareholders for the purpose of forming a new corporation under the same corporate name as that of the old company. A corporation may always be dissolved without the consent of its creditors. Upon the dissolution of a corporation the rights of its creditors become fixed; and they are entitled to have the assets left by the company sold, and the proceeds applied in payment of their claims. The formation of a new corporation, with a new capital, by the shareholders of the old company, would not affect this right. The equitable lien of creditors of the old company upon its property would continue until after a transfer to a purchaser for value; but they would have no equitable lien upon the

¹ This was held to be the effect *Bank*, 46 Mo. 140. Compare *State of the reincorporation of a State v. National Bank*, 83 Md. 75; *Hyde bank as a national bank, pursuant v. Doe*, 4 Sawy. 133. See the next section. *Banking Act. Coffey v. National*

assets of the new company, and would have no right to rank as its creditors.¹

§ 812. What operates as the Formation of a new Corporation. — Justice Story said: "To ascertain whether a charter create a new corporation or merely continue the existence of the old one, we must look to its terms, and give them a construction consistent with the legislative intent and the intent of the corporators."² If the object of a transaction is practically to revive or prolong the existence of a corporation which has expired or is about to expire, but not to change the company's identity or to form a new corporation, this would imply an intention to continue the obligations of the old company against the company in its new form. A mere change of name would be immaterial.³ On the other hand, if the object of the transaction is to form a new corporation, with a new capital, no intention to continue the obligations of the old com-

¹ Compare *Wood v. Dummer*, 3 Mason, 308, and *Bellows v. Hallowell, &c. Bank*, 2 Mason, 31; *Blair v. St. Louis, &c. R. R. Co.*, 22 Fed. Rep. 36; *Marshall v. Western North Carolina R. R. Co.*, 92 N. Car. 322, 331; and see the cases cited in the next section. See also *Jeaffreson's Case*, L. R. 11 Eq. 109, and *Norton's Case*, 11 W. R. 1007, which were cases of English *limited* companies. Compare *Booth v. Bunce*, 33 N. Y. 139.

If the new company acquired assets of the old company without giving value therefor, it would be liable to account to creditors for the assets so received. See *supra*, § 789.

² *Bellows v. Hallowell, &c. Bank*, 2 Mason, 44. See *infra*, § 1038.

³ *Mayor of Colchester v. Brooke*, 7 Q. B. 339, 381; *Mayor of Colchester v. Seaber*, 3 Burr. 1866; s. c. 1 W. Bl. 591.

In *Broughton v. Pensacola*, 93 U. S. 266, 270, Mr. Justice Field said: "When a new form is given

to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization." See also *Milner v. Pensacola*, 2 Woods, 632; *Goulding v. Clark*, 34 N. H. 148; *Lea v. American, &c. Canal Co.*, 3 Abb. Fr. n. s. 12. *Acres v. Moynes*, 59 Tex. 623; *Trustees of University v. Moody*, 62 Ala. 389.

pany as against the new company can be implied, although the shareholders and officers of both companies may be the same. Under these circumstances, therefore, the only right of creditors will be to enforce their equitable rights against the assets of the old corporation.¹

The term "reorganization" is commonly applied to the formation of a new corporation by the creditors and shareholders of a corporation which is in financial difficulties, for the purpose of purchasing the company's works and other property, after the foreclosure of a mortgage or judicial sale. The result of a transaction of this kind is to form a new corporation to carry on the business of the old company upon a new basis, free from its debts and obligations, except to the extent that they have been expressly assumed.²

§ 813. *Changes made in Pursuance of the Charter.* — It is clear that the creditors of a corporation cannot complain of any transaction or engagement entered into by the company in accordance with the terms of its charter.³ Persons deal-

¹ *Bellows v. Hallowell, &c. Bank*, 2 Mason, 31; *Wyman v. Hallowell, &c. Bank*, 14 Mass. 58; and see *Port Gibson v. Moore*, 13 Sm. & M. 157; *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 17; *Bruffett v. Great Western R. R. Co.*, 25 Ill. 353; *Marshall v. Western North Carolina R. R. Co.*, 92 N. Car. 322, 331.

² *Lake Erie, &c. Ry. Co. v. Griffin*, 92 Ind. 487; *Pennsylvania Transportation Co.'s Appeal*, 101 Pa. St. 576; *Neff v. Wolf River Boom Co.*, 50 Wis. 585; *Houston, &c. R. R. Co. v. Shirley*, 54 Tex. 125; *Menasha v. Milwaukee, &c. R. R. Co.*, 52 Wis. 414; *Gilman v. Sheboygan, &c. R. R. Co.*, 37 Wis. 317; *Cook v. Detroit, &c. Ry. Co.*, 43 Mich. 349; *Hammond v. Port Royal, &c. Ry. Co.*, 15 S. Car. 10; s. c. 16 S. Car. 587; *Sappington v. Little Rock, &c. R. R. Co.*, 37 Ark. 23.

The rights of creditors of a corporation who join in a scheme of reorganization, to be carried out by the purchase of the company's property at a sale, rest solely upon the contract between the parties. Creditors who do not join in the scheme of reorganization, can claim no rights under it. *Pennsylvania Transportation Co.'s Appeal*, 101 Pa. St. 576.

A statute giving the purchasers under a foreclosure and judicial sale of a railroad a clear title to the property, and authorizing them to organize as a new corporation, would impair no rights of the general creditors of the old company, as their claims against the company's property were cut off by the foreclosure sale. *Cook v. Detroit, &c. Ry. Co.*, 43 Mich. 349; *Houston, &c. R. R. Co. v. Shirley*, 54 Texas, 125.

³ *Supra*, § 782.

ing with a corporation must be held to know its nature and chartered purposes; and hence they cannot complain of any modification of their rights, or of any dealing with the corporate assets which is expressly authorized by the company's charter.

Even a novation of the contract of creditors may be effected, if this be expressly provided for in the company's charter. The necessary consent must, under these circumstances, be deemed to have been given in advance. Thus, in *Hort's Case* the deed of settlement of an insurance company provided that the funds of the company should alone be answerable for its liabilities; it was also provided that the proprietors should have power to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the liabilities of the former company, in consideration of a transfer of a sufficient amount of its assets. It was held that, after a dissolution had been effected under this provision, and a transfer had been made in accordance with the provisions of the deed, the policy-holders of the first company could claim only as creditors of the second company, whose liability had been substituted in place of that of the first.¹ An amalgamation effected under a similar provision operates as a transfer of the liabilities of the original company to the new company formed by the amalgamation.²

§ 814. *Rights of Creditors cannot be impaired by State Legislation.* — The constitutional prohibition against State legislation impairing the obligations of contracts must be construed in a broad sense, so as to extend its protection over all contractual relations. Its application is not restricted to what are called "contracts" in the technical phraseology of the common law.³ Accordingly, in applying this constitutional provision for the protection of contract creditors of corporations the courts have considered the real character of the

¹ *In re European Assurance Soc.*, 1; *Harman's Case*, L. R. 1 Ch. D. *Hort's Case* and *Grain's Case*, L. R. 826; *Doman's Case*, L. R. 8 Ch. 1 Ch. D. 807, 817; *Dowse's Case*, D. 21, 26.
L. R. 8 Ch. D. 384.

² Compare *infra*, § 1045 *et seq.*

³ *Cocker's Case*, L. R. 8 Ch. D.

contracts entered into by corporations, and have recognized the true relation existing between the creditors of a corporation and its shareholders. Thus, the right of parties who have given credit to a corporation to have the benefit of the security furnished by the company's capital,¹ and the right to charge the shareholders individually to the extent to which they have assumed individual liability,² are contract rights which cannot be impaired by State legislation. On the other hand, a State law nominally altering the rights of contract creditors of a corporation will not be held to be unconstitutional, if no rights acquired by their contracts have really been impaired.³

The States may undoubtedly pass laws altering the remedies of creditors of corporations, and may pass limitation laws restricting the time within which they may enforce their rights.⁴

¹ *Curran v. State*, 15 How. 314; *Gibbes v. Greenville, &c. R. R. Co.*, 13 S. Car. 228; *Montgomery, &c. R. R. Co. v. Branch*, 59 Ala. 139.

² *Hawthorne v. Calef*, 2 Wall. 10; *infra*, § 872.

³ In *Atty.-Gen. v. North America Life Ins. Co.*, 82 N. Y. 172, it was held that the Registration Act of 1866, giving the holders of registered policies in an insurance company a preference over the holders of non-registered policies by providing a special fund for their security, was not unconstitutional as impairing the rights of the non-registered policy-holders. Earl, J., said: "The holders of the registered policies were given a preference of payment upon a fund substantially created with money contributed by them. The special fund created for their benefit could never, in the ordinary management of a company, be greater than the money contributed by such policy-holders, and it seems to me quite absurd to say that a

provision that they should have payment of such fund in preference to other policy-holders violated the obligation of any contract within the meaning of the Constitution." Compare *Luther v. Saylor*, 8 Mo. App. 424. Upon this general subject, compare Chapter XV.

⁴ In *Gilfillan v. Union Canal Co.*, 109 U. S. 401, it was held that a provision in an act passed by the legislature of Pennsylvania, for the reorganization of an embarrassed corporation, providing that the holders of its mortgage bonds who should not within a prescribed time expressly dissent from the plan of reorganization should be deemed to have assented to it, and making ample provision for the notification of all the bondholders, did not impair the obligation of a contract, and was valid. The case was held to be within the principle of *Terry v. Anderson*, 95 U. S. 628, in which statutes of limitation were held to be constitutional in their application to

§ 815. **Rights of Creditors under Provisions in the Charter for their Benefit.** — Creditors of a corporation cannot insist upon having the charter contract upheld and carried out because they are not parties to that contract;¹ but such provisions in a charter as enter into the contracts made by a corporation may be enforced by the parties contracting with it as part of their contract rights. Thus, the capital provided by the charter of a corporation for the purpose of giving credit to the company is by implication pledged to parties dealing with the corporation, as security for their claims; and this security cannot be diminished as to existing creditors without their consent.²

Where the immediate purpose of a provision in a charter is to give credit to a company, and to improve the security of its creditors, such provision must be treated as constituting an implied condition in every contract made by the company, in which its credit is a material element. A repeal of such provision might be constitutional so far as it operated as an alteration of the company's charter and prevented the execution of future contracts on the faith of the provision, but the legislature would have no power to impair the contracts of existing creditors, by altering the security upon the faith of which they dealt with the company.

The charter of the State Bank of Arkansas provided, (1.) that the corporation should have a capital stock of one million dollars, to be raised by the sale of bonds of the State; and also (2.) that certain other funds, specifically described, should be deposited therein by the State, and constitute a part of the capital of the bank. It was held by the Supreme Court of the United States, that the State of Arkansas, although sole stockholder of the bank, could not withdraw any portion of the assets of the bank, leaving creditors unpaid. Justice Curtis said: "The bank received this money from the State as the fund to meet its engagements with third parties, which the State, by the charter, expressly author-

existing contracts. Compare *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527; and see *infra*, § 1056.

¹ *Supra*, § 807.

² *Supra*, § 789.

ized it to make for the profit of the State. Having thus set apart this fund in the hands of the bank, and invited the public to give credit to it under an assurance that it had been placed there for the purpose of paying the liabilities of the bank whenever such credit was given, a contract between the State and the creditor not to withdraw that fund to his injury at once arose. That the charter, followed by the deposit of the capital stock, amounted to an assurance held out to the public by the State, that any one who should trust the bank might rely on that capital for payment, we cannot doubt. And when a third person acted on this assurance, and parted with his property on the faith of it, the transaction had all the elements of a binding contract, and the State could not withdraw the fund, or any part of it, without impairing its obligation."¹

§ 816. Upon the same principle, it has been decided that a clause in the charter of a bank created by the State for its own benefit, that the bills and notes of the bank should be received in payment of taxes and other debts due to the State, must be considered as impliedly incorporated into every bill or note issued by the bank; and that a contract was thus created through the agency of the bank between the State and every bill or note holder, which could not be impaired by subsequent legislation.²

It has likewise been held that a provision in the charter of a corporation, making its shareholders individually responsible for its debts, cannot be repealed with respect to creditors who have already contracted with the company.³ However, creditors of a corporation have no right to object to an alteration of the company's charter; they are merely entitled to have their own contracts with the company respected. It follows, therefore, that a statute providing that the holders of shares thereafter to be issued shall not incur individual liability to creditors, would not impair the rights

¹ *Curran v. State*, 15 How. 814.
See *Gibbes v. Greenville, &c. R. R. Co.*, 18 S. Car. 228; *Hand v. Savannah, &c. R. R. Co.*, 12 S. Car. 815.

² *Woodruff v. Trapnall*, 10 How. 190; *Furman v. Nichol*, 8 Wall. 44; *Keith v. Clark*, 97 U. S. 454.
³ *Hawthorne v. Calef*, 2 Wall. 10.

of existing creditors; nor would there be any objection to a law discharging the holders of shares already issued from liability for future debts.¹

§ 817. **Effect of Reservation of the Power to alter or repeal a Charter upon the Rights of Creditors.** — Parties dealing with a corporation must take notice of a power of alteration reserved in the charter of a corporation, and cannot complain of any legitimate exercise of the power.² A reservation of the power of alteration and repeal does not enable the State to confiscate the rights of creditors, as by distributing the assets of the company leaving creditors unpaid,³ or by discharging stockholders from a personal liability for existing debts;⁴ but any change in the use or application of the corporate funds, or the agencies by which those funds are to be administered, may undoubtedly be effected under a reservation of power to alter *the charter* of the company.⁵

PART II.

RIGHTS OF CREDITORS AGAINST SHAREHOLDERS WITH RESPECT TO THE COMPANY'S CAPITAL.

§ 818. **The Relation between Creditors and Shareholders.** — As a general rule, a corporation is treated as an entity or person distinct from its shareholders, and obligations incurred by the corporation are regarded solely as obligations of the cor-

¹ Ochiltree v. Railroad Co., 21 Wall. 249; 54 Mo. 113; Robinson v. Bank of Darien, 18 Ga. 87; Woodruff v. Trapnall, 10 How. 206.

² Read v. Frankfort Bank, 23 Me. 318; Lothrop v. Stedman, 18 Blatchf. 143.

³ See Curran v. State, 15 How. 812; Barings v. Dabney, 19 Wall. 1; Dabney v. Bank of South Carolina, 3 S. Car. 124.

⁴ Hawthorne v. Calef, 2 Wall. 10.
VOL. II. — 16

⁵ The policy-holders in a mutual insurance company having no capital stock, occupy a position similar to that of shareholders; they are not properly speaking creditors. This circumstance is material in determining the extent to which their rights may be altered, under a reservation of the power of altering or amending the company's charter. Allen v. Life Association of America, 8 Mo. App. 52.

porate entity or person. Whatever rights the creditors may have against the individual shareholders are regarded as rights derived indirectly through the corporation. This view, however, is not strictly correct. A corporation, as has been pointed out repeatedly,¹ is not something distinct from its shareholders, but is made up of its shareholders. It is identical with the association of shareholders, taken collectively; and the existence of a corporation as a separate entity or person is a fiction.

While the courts of law recognize a corporation only as a distinct entity, the courts of equity will take cognizance of the real character of the organization and the relative positions occupied by its members and creditors, whenever the adjustment of the rights and obligations of the parties requires this.² In *Upton v. Englehart*,³ a case involving the equitable rights of creditors against the shareholders of a corporation, Dillon, J., said: "Whoever becomes a stockholder in an incorporated company sustains a threefold relation: first, to the artificial person called the corporation; secondly, to the other stockholders in the same company, or, in other words, his associates or partners, who by force of statute are clothed with corporate capacity; and, thirdly, to the creditors of the corporation. It is essential to bear these several relations in mind, in determining the questions here presented. The capital is supplied by the shareholders, who alone participate in the gains or pecuniary advantages which may accrue from the carrying on of the corporate enterprise. The shareholders are the real parties in interest, the incorporating statute empowering them to contract and be contracted with through the medium of a corporate representative."

So, in *Sawyer v. Hoag*,⁴ Justice Miller said: "After all, this artificial body is but the representative of its stock-

¹ *Supra*, §§ 1, 227.

² The true relation between the shareholders and creditors of a corporation has been distinctly recognized by the courts, in enforcing the individual liability of shareholders

under special statutory provisions.

See *infra*, § 869 *et seq.*

³ *Upton v. Englehart*, 3 Dill. 497.

⁴ *Sawyer v. Hoag*, 17 Wall. 610, 623. See also *Des Moines Gas Co. v. West*, 50 Iowa, 16, 25.

holders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect; and the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is therefore but just, that when the interest of the public or of strangers dealing with the corporation is to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subjected to a rigid scrutiny, and if found to be affected with anything unfair toward such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

§ 819. *At Law the Liability to contribute Capital is treated as a Debt due the Corporation.* — The liability assumed by the shareholders in a corporation to contribute the amount of their shares as capital, is usually subject to certain expressed or implied conditions precedent, such as the subscription of a certain aggregate amount of capital and the making of regular calls or assessments; but after these conditions have been complied with and the liability has matured, it is treated as a legal debt due the corporation.¹ The corporation may assign this liability, like any other chose in action; and it has been held that it will pass to an assignee under a general assignment for the benefit of creditors.² It is also subject to at-

¹ In *Hatch v. Dana*, 101 U. S. 211. Mr. Justice Strong said: "By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription."

² *Shockley v. Fisher*, 75 Mo. 498; *Haskell v. Sells*, 14 Mo. App. 91; *Eppright v. Nickerson*, 78 Mo. 482; *Dean v. Biggs*, 25 Hun, 122; *Glenn v. Dorsheimer*, 24 Fed. Rep. 536.

It has been held that the assignee for the benefit of creditors may enforce the liability of the stockholders by a proceeding in equity without any further call. *Lionberger v. Broadway Savings Bank*, 10 Mo. App. 499. An assignee of a corporation, under a bankruptcy or insolvency act, generally represents creditors, by force of the statute, and may enforce the liability of shareholders although the corporation would be unable to do so by reason of the non-performance of a condition precedent, such as the making of a regular call. Under

tachment by creditors of the corporation, and may be reached by an attachment in execution or garnishee process, to the same extent as any other claim belonging to the corporation.¹

§ 820. *In Equity the Liability to contribute Capital is treated as Assets.* — Debts due a corporation are equitable assets, and may be reached by creditors through the aid of a court of chancery, if the legal assets which can be reached by execution prove insufficient. The liability of the shareholders to contribute the amount of their shares as capital is treated in equity as assets, like other legal claims belonging to the corporation.² This liability, together with the capital actually contributed, constitutes the trust fund which in equity is deemed pledged for the payment of the corporate debts.³

the common law, however, an assignee would acquire only such rights as the corporation itself possessed. Compare *Epwright v. Nickerson*, 78 Mo. 482; *Glenn v. Dorsheimer*, 24 Fed. Rep. 536; *Hill v. Reed*, 16 Barb. 280; *Hurlbut v. Root*, 12 How. Pr. 511; *Hurlbut v. Carter*, 21 Barb. 221. and see *infra*, § 822.

¹ *Simpson v. Reynolds*, 71 Mo. 594; *Hannah v. Moberly Bank*, 67 Mo. 678; *Bunn's Appeal*, 105 Pa. St. 49, 63; *Meints v. East St. Louis, &c. Mill Co.*, 89 Ill. 48. Compare *Hughes v. Oregonian Ry. Co.*, 11 Oreg. 158; *McKelvey v. Crockett*, 18 Nev. 238.

These remedies, of course, would not apply if the liability had not matured and become a debt due the corporation by a regular call and the performance of all other conditions precedent. *Chandler v. Siddle*, 10 N. B. R. 236. *Bunn's Appeal*, 105 Pa. St. 49, 63.

It has, however, been held, in the Circuit Court of the United States, that a judgment creditor of a corporation may, under the laws of Pennsylvania, levy an execution attachment upon equitable claims as

well as legal ones, and may consequently reach the liability of shareholders although no call has been made. *Re Glen Iron Works*, 20 Fed. Rep. 674. See also *Hays v. Lycoming Fire Ins. Co.*, 98 Pa. St. 184. Compare, however, *Bunn's Appeal*, 105 Pa. St. 49, 72.

² *Hatch v. Dana*, 101 U. S. 205.

³ In *Sanger v. Upton*, 91 U. S. 60, Mr. Justice Swayne said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. . . . The creditors have a lien upon it in equity. . . . It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." *Spack-*

§ 821. Creditors have an unconditional Right to Payment of Capital. — No Calls necessary. — It has been pointed out that the liability of shareholders to contribute the amount of capital subscribed by them is, by the terms of their contracts with the company, subject to certain conditions precedent with regard to the time and manner of making payments. Thus the shareholders ordinarily agree to pay the amount of their shares into the company's treasury only after a regular assessment or call by the board of directors; and until this assessment or call has been made, the corporation cannot compel them to pay.¹

Conditions of this character do not enter into the equitable obligation assumed by the shareholders towards creditors, to contribute the company's capital as a fund for their security. The fact must be recognized, that the shareholders are the real parties in interest, who carry on business and incur debts under the corporate name, and that the directors are really their agents and nominees. If shareholders choose to carry on business with borrowed money instead of using the capital which they have agreed to provide, they are bound to contribute the capital whenever needed to discharge the corporate obligations. It would be absurd to hold that, although the capital of a corporation is subscribed by the shareholders as a fund equitably pledged for the payment of the company's creditors, the liability of the shareholders to contribute this fund when actually required for the payment of creditors is conditional upon the will of agents selected by the shareholders themselves.² In equity, therefore, the shareholders of an insolvent corporation are held to be unconditionally liable to its creditors to contribute the amount of capital subscribed by them, although their subscriptions were con-

man v. Evans, L. R. 3 H. L. 198;

Bassett v. St. Albans Hotel Co., 47 Vt. 314; Jeaffreson's Case, L. R.

11 Eq. 115; County of Morgan v.

Allen, 103 U. S. 498; *per* Justice

Grier in *Ogilvie v. Knox Ins. Co.*,

22 How. 387.

¹ *Supra*, § 143. As to what constitutes a waiver of such conditions, see *supra*, § 156.

² See *Re Glen Iron Works*, 20 Fed. Rep. 674, 680, *per* Justice Bradley.

ditional, as between themselves and the company, upon a regular call or assessment by the board of directors.

Accordingly, in *Hatch v. Dana*,¹ it was held that a judgment creditor of a corporation could by an ordinary creditor's bill, recover from the company's shareholders the amounts unpaid upon their shares, although, by the terms of their subscriptions, they had agreed to pay only "as called for by the company," and no call had actually been made.

§ 822. **Powers of Receivers and Assignees in Bankruptcy.** — If a receiver or assignee in bankruptcy has been appointed to collect the assets of an insolvent corporation for the benefit of its creditors, the court should direct the receiver or assignee to make a ratable assessment upon the shareholders for so much of the amount unpaid on their shares as may be necessary for the satisfaction of creditors. Such an assessment is not required on the theory that the liability of the shareholders is conditional, as against creditors, upon a call by the directors, and that an order of the court is a sufficient performance of the condition; the object of an assessment by the court is merely to do equity among the shareholders by distributing the collective liability ratably among them. This method of proceeding should be followed, although the shareholders had, by the terms of their subscriptions, agreed to contribute the amount of their shares without any call, and subject to no condition. An assessment thus made by the court operates as a demand upon each shareholder of a contribution of the amount assessed against him, for the benefit of creditors; and the receiver or assignee representing cred-

¹ *Hatch v. Dana*, 101 U. S. 205, 214. See also *Salmon v. Hamborough Co.*, 1 Cas. in Ch. 204; *Crawford v. Rohrer*, 59 Md. 599; *Myers v. Seeley*, 10 N. B. R. 411; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Sanger v. Upton*, 91 U. S. 56; *Marsh v. Burroughs*, 1 Woods, 463; *Germanatown, &c. Ry. Co. v. Fidler*, 60 Pa. St. 124; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 601; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *Curry v. Woodward*, 58 Ala. 375; *Adler v. Milwaukee, &c. Brick Co.*, 13 Wis. 60; *Hyatt v. McMahon*, 25 Barb. 457; *Dayton v. Borst*, 31 N. Y. 435; *Henry v. Vermillion, &c. R. R. Co.*, 17 Ohio, 187, 191; *Dalton, &c. R. R. Co. v. McDaniel*, 56 Ga. 191; and cases *infra*, § 868 *et seq.*

itors is authorized to collect the amount assessed, and enforce payment by suit against each delinquent shareholder.¹ Every shareholder is liable to the receiver or assignee after such an assessment, whether he was a party to the proceeding or not. The court acquires jurisdiction to appoint a receiver or assignee of the corporate assets by service of process upon the corporation. Moreover, as every shareholder of an insolvent corporation is unconditionally liable in equity to contribute the whole amount unpaid upon his shares, at the suit of any judgment creditor,² no shareholder ought to be allowed to complain, if the right to enforce as much of the amount as may be equitably due after an adjustment among all the shareholders is transferred to a receiver or assignee representing the creditors. These views are in accordance with repeated adjudications of the courts.³

§ 823. Shareholders are liable although the whole Capital has not been subscribed. — The agreement of shareholders in a corporation to pay the amount of their shares to the company is subject to the condition that the whole of the capital pre-

¹ Glenn v. Williams, 60 Md. 93, 116; Glenn v. Soule, 22 Fed. Rep. 417. Compare *supra*, § 819.

² See Hatch v. Dana, 101 U. S. 205.

³ See Glenn v. Williams, 60 Md. 93, 116, 122; Wilbur v. The Stockholders, 13 Phila. 479; s. c. 18 N. B. R. 173, 182; Lane v. Nickerson, 99 Ill. 284; Bunn's Appeal, 105 Pa. St. 49; Glenn v. Dorsheimer, 24 Fed. Rep. 536; and see *infra*, § 866.

In *Scovill v. Thayer*, 105 U. S. 143, 155, Justice Woods said: "It is well settled that, when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interest of creditors require it. The court will do what it is the duty of the company to do.

But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand."

As to when the statute of limitations begins to run in favor of the shareholders as against creditors, see *Payne v. Bullard*, 23 Miss. 88; *Curry v. Woodward*, 53 Ala. 371, 376; *Allibone v. Hager*, 46 Pa. St. 48, 54; *Harmon v. Page*, 62 Cal. 448; *Glenn v. Dorsheimer*, 23 Fed. Rep. 695; *Glenn v. Soule*, 22 Fed. Rep. 417; *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777.

scribed by the charter shall have been subscribed; for until then the company would have no authority to begin to carry on its business, and the use of capital would not be required.¹ But if a corporation should, in violation of its charter, begin to carry on business, and incur debts before the full amount of capital required by law has been obtained, there can be no doubt that its shareholders would be liable to contribute the amount of their shares, if necessary to pay creditors. One of the main objects of requiring the nominal capital of a corporation to be fully subscribed before it may begin to carry on business, is to provide creditors with a certain fund as security. If the agents of a corporation incur debts within the scope of their apparent powers, this is a representation to the public that the amount of capital required by law has been subscribed; and if the representations thus made were false, it is clear that the members of the company, who are the real principals, should suffer any loss which may ensue, rather than innocent third parties who may have been misled.²

§ 824. Shareholders cannot release themselves from Liability to future Creditors to contribute Capital. — One of the objects of fixing the capital of a corporation, by its charter, at a definite amount, is to provide a fund to pay the company's legal obligations and secure those who may give it credit. A corporation has, therefore, no legal right to begin its business operations and incur debts until the amount of capital fixed by its charter has been subscribed.³

It is evident that the policy of the law would in a great measure be defeated, if shareholders could, through a resolution adopted by themselves, or a release executed by their own agents, discharge themselves from the obligation to contribute the prescribed amount of capital, or if they could, after having paid in the capital, distribute the capital among themselves, or otherwise divert it from the corporate uses, and still continue to carry on the company's business. By

¹ See *supra*, § 137.

² *Morrison v. Dorsey*, 48 Md. 468; *Musgrave v. Morrison*, 54 Md. 161; *Hager v. Cleveland*, 86 Md. 476.

Compare *Boston, &c. R. R. Co. v. Pearson*, 128 Mass. 445; and see *supra*, §§ 156, 598, 610.

³ *Supra*, § 408.

such a proceeding, future creditors of the company would be left without that fund for the payment of their claims which the law intended they should have; and there would be manifest danger of deception and fraud upon those who might deal with the company thereafter on the faith of the capital indicated by the charter. To prevent the accomplishment of these results, the courts have recognized that a corporation is really but an association of shareholders, and that the corporate obligations are really incurred on behalf of the shareholders by agents whom they have chosen; and it has been held that the shareholders cannot by any subterfuge escape the measure of responsibility for the corporate obligations which the law imposes upon them. Thus, if shares have not in fact been paid up, a resolution that they shall be deemed paid-up shares, although unanimously adopted in corporate meeting, will not discharge the holders, or their transferees with notice, from liability to contribute the amount of the shares for the payment of the corporate debts incurred thereafter; and a release formally executed by the agents of the corporation to its shareholders, or a simulated payment of the stock subscriptions and return of the money to the subscribers in the form of a loan, will be equally ineffective.¹

§ 825. *Payment of Shares in Property or Services.*—The capital of a corporation may be contributed in the form of property to be used in the company's business, or of services for which the corporation would be entitled to expend its

¹ *Upton v. Tribilcock*, 91 U. S. 424; *Skrainka v. Allen*, 7 Mo. App. 48; *Upton v. Hansbrough*, 3 Biss. 434; *Chouteau v. Dean*, Id. 210; 417, 427; *Sawyer v. Hoag*, 17 Wall. 424; *Gill v. Balis*, 72 Mo. 424; *Woodfork v. Union Bank*, 3 Coldw. 501; 610; *Upton v. Jackson*, 1 Flipp. 501; *Wetherbee v. Baker*, 35 N. J. 418; *Crawford v. Rohrer*, 59 Md. 599; *Clarke v. Lincoln Lumber Co.*, 59 Wis. 659, 660; *Slee v. Bloom*, 19 Johns. 456; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Osgood v. King*, 42 Iowa, 478; *Burnham v. Northwestern Ins. Co.*, 36 Iowa, 632; *Rider v. Morrison*, 54 Md. 429; *Schley v. Dixon*, 24 Ga. 278; *Moses v. Ocoee Bank*, 1 Lea, 399. Compare *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334; *Currier v. Lebanon Slate Co.*, 56 N. H. 262. See *Mann v. Cooke*, 20 Conn. 178; *County of Morgan v. Allen*, 103 U. S. 498.

funds.¹ A contribution of property or services by a shareholder would undoubtedly discharge his obligation to creditors, in respect of the amount of capital to be contributed by him, to the extent of the value of the property or services; and if the property or services so contributed were valued by the agents of the corporation, in good faith, at a certain sum, creditors would be bound thereby, though the valuation may prove to be excessive.² However, if property or services contributed by a shareholder to pay up his shares were not valued in good faith at the amount of capital to be contributed in respect to the shares, they would not be fully paid up by such contribution, either in fact or in law; nor would a declaration by the corporation that they were paid-up shares deprive creditors of their right to insist on the contribution of the company's entire capital, in case of insolvency.

In *Wetherbee v. Baker*,³ the law upon this subject was stated as follows, by Depue, J.: "The earlier cases held that the contract of the subscribers could only be fulfilled by payment in money. In later cases this doctrine has been re-

¹ *Supra*, §§ 427, 428.

² *Coit v. North Carolina, &c. Amalgamating Co.*, 14 Fed. Rep. 12; s. c. 15 Phila. 496; *Peck v. Coalfield Coal Co.*, 11 Bradw. (Ill.) 88; *Phelan v. Hazard*, 5 Dill. 45; *Carr v. Le Fevre*, 27 Pa. St. 413; *Van Cott v. Van Brunt*, 2 Abb. N. C. 283. Compare *Foreman v. Bigelow*, 4 Cliff. 508; *Stacy v. Little Rock, &c. R. R. Co.*, 5 Dill. 376.

The same rule seems to apply where paid-up shares are issued by an English "limited" company, under the acts of 1862 and 1867. The authorities, however, are not all in harmony. See *per* Sir John Stuart, V. C., in *Leeke's Case*, L. R. 11 Eq. 100; s. c. on appeal, L. R. 6 Ch. 469; *Disderi's Case*, L. R. 11 Eq. 242; *Sykes's Case*, L. R. 18 Eq. 255; *Forbes & Judd's Case*, L. R. 5 Ch. 270; and compare *Schroder's*

Case, L. R. 11 Eq. 131; *Coates's Case*, L. R. 17 Eq. 169; *Ferrao's Case*, L. R. 9 Ch. 355. Compare also *Currie's Case*, 3 De G., J. & S. 367; *Leifchild's Case*, L. R. 1 Eq. 231; *Ashworth v. Bristol, &c. Ry. Co.*, 15 L. T. N. s. 561; *Guest v. Worcester, &c. Ry. Co.*, L. R. 4 C. P. 9; *Pell's Case*, L. R. 5 Ch. 11; *Baron de Beville's Case*, L. R. 7 Eq. 11; *Dent's Case*, L. R. 15 Eq. 407; 8 Ch. 775; *Fothergill's Case*, L. R. 8 Ch. 270; *Spargo's Case*, Id. 407; *Brown's Case*, L. R. 9 Ch. 102; *Carling's Case*, L. R. 1 Ch. D. 115.

It has been held that shares were paid up by the publication in a newspaper of advertisements and articles puffing the company and its enterprise. *Liebke v. Knapp*, 79 Mo. 22.

³ *Wetherbee v. Baker*, 35 N. J. Eq. 501, 513, overruling, 32 Id. 537.

laxed, and stock issued and paid up in work and labor, or in the purchase of property the corporation is authorized to hold, has been held to have been legally issued. Statutes have also been passed authorizing corporations to purchase property needed for their business, and to issue stock in payment for it, or to accept such property in payment for subscriptions to the capital stock. But in all such cases, transactions under such powers have been upheld only where the contract for the rendition of services or the purchase of property, payable in stock, has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair *bona fide* valuation; and the courts have inflexibly enforced the rule, that payment of stock subscriptions is good as against creditors only where payment has been made in money, or in what may fairly be considered as money's worth."

§ 826. In *Van Cott v. Van Brunt*,¹ the Court of Appeals of New York expressed views which cannot be reconciled with the authorities cited in the preceding sections, or with the general doctrine that the amount of capital indicated by the charter of a corporation fixes the amount which the shareholders are under a legal obligation to contribute for the security of the company's creditors. The facts of the case were as follows. The defendant, Van Brunt, being president and director of a railroad company, made a contract on behalf of the company with a contractor, for the construction and equipment of a portion of the railroad, to be paid for by the delivery of a certain amount of bonds and paid-up stock. Immediately afterwards, in accordance with a previous arrangement with the defendant, the contractor assigned the contract to the defendant, who, with his associates, built the road and received the stock and bonds.

The company having become insolvent, a receiver was appointed, and the latter brought suit against the defendant and other shareholders to compel them to contribute the amount actually unpaid on the shares received by them under the contract. The Court of Appeals however held, overrul-

¹ *Van Cott v. Van Brunt*, 82 N. Y. 535.

ing the Supreme Court,¹ that the defendants were not liable, although the amount of the shares had not been contributed to the company's capital in money or money's worth.

This decision was probably correct,² but the reasoning by which the conclusion of the court was reached is certainly unsound. The court appears to have considered that creditors could have no cause of complaint, if the work done and materials furnished were worth "the fair and just value" of the stock and bonds when delivered; and throughout the opinion the right of issuing fully paid-up shares and the right to sell bonds for their actual value are treated as resting upon the same basis.³ It is clear, however, that the functions of shares and bonds, and the rules governing their issue, depend upon entirely different principles.

¹ The decision of the Supreme Court is reported in 2 Abb. N. C. 283.

² As the shares were issued at their actual value, and as all the shareholders assented, the corporation could not complain of the transaction, or treat the shares as not fully paid up, contrary to the agreement. (See *supra*, § 290.) Creditors, therefore, could not impose on the holders of these shares a liability to pay them up, on the ground that this liability was part of the assets of the company.

The report does not show that there were any creditors having special equities. Creditors whose claims arose prior to the issue of the shares would have had no better equity than the corporation, and it does not appear that there were subsequent creditors who had a right to assume that the shares had actually been paid up. See *infra*, §§ 829-832.

³ In the course of the opinion, the court used the following language: "There is no evidence in the record before us to establish affirmatively that the value of the

work done and materials furnished was less than the fair and just value of the stock, or that the road built and equipped was worth less than said stock. In fact, the testimony shows that the amount expended exceeded the actual value of the stock and bonds which were received in consideration of the same. . . . It is difficult to see how creditors could be defrauded, when all the property which the company ever had remained in its possession and under its control. . . . If the rule be once established that no agreement can be made to build railroads by the transfer of stocks or bonds to the contractor, without rendering him liable for the par value thereof, it would seriously interfere with the construction of enterprises of this description, and would prevent the building of many railroads. . . . Stockholders can only be made liable where it is shown that the stock has been actually taken by them, or fraudulently received, and not where it had been delivered, in good faith and for an adequate consideration, by the corporation to the stockholder." (pp. 540, 543.)

Shares merely represent the proportionate interest of the holders in the whole corporate concern. Their amount is fixed at a certain sum, in order to settle the amount of capital which each corporator must contribute to the joint speculation, and to indicate to parties dealing with the company the amount of security upon which they can rely. It is as easy to organize a corporation with a nominal capital of ten millions of dollars, as with a nominal capital of a thousand dollars. All the shares in the one corporation would not be worth more than all the shares in the other, unless paid up; and they might all be issued "in good faith" as paid-up shares in consideration of a hundred dollars. Any consideration would be "adequate," and equal to "the fair and just value" of the shares, for the purchaser would simply be buying what he gave, *plus* the labor and expense of organizing the corporation.

On the other hand, the value of bonds issued by the company would depend upon the security furnished by the company's capital, and the rate of interest agreed to be paid. By selling bonds for less than their *actual value*, the shareholders would reduce the company's existing capital;¹ by issuing shares as fully paid up without requiring their amount to be actually contributed to the company's capital, they would not lessen the existing capital; but they would be guilty of a fraud on subsequent creditors, from whom they obtained credit on the representation that the amount of these shares had in fact been contributed.

§ 827. **Capital abstracted must be restored for the Benefit of future as well as existing Creditors.** — Upon the same principle, it has been held that, if the shareholders in a corporation should make a distribution of capital among themselves in the form of dividends, with the intention of continuing the corporate business, they would be liable, in equity, to future as well as existing creditors, to restore the amount of capital abstracted, if necessary to pay their claims in full.²

¹ *Supra*, § 792.

v. Page, 17 B. Monr. 412; *Gratz v.*

² *Williams v. Boice*, 38 N. J. Redd, 4 B. Monr. 187-190; *Reid v. Eq.* 364; *Lexington, &c. Ins. Co. Eatonton Manuf. Co.*, 40 Ga. 104;

§ 828. *Application of this Doctrine to Claims arising through Torts of the Company.* — The general doctrine discussed in the preceding sections, relating to the liability of shareholders to the extent of the capital fixed by the company's charter, appears to apply equally in respect of all the corporate debts and obligations, whether they were created by contract or resulted from torts committed by the company's agents.

As the shareholders in a corporation are the real principals and parties in interest who directly or indirectly appoint the corporate agents, and for whose benefit these agents act, they should be held responsible for the torts committed by the corporate agents, like any other principal, to the extent of the capital which the charter provides that they shall contribute. And the shareholders ought not to be allowed to escape this measure of liability by any resolution among themselves or other subterfuge.

§ 829. *Persons dealing with a Corporation may consent to existing Arrangements.* — The rights of persons contracting with a corporation, as against the individual shareholders, rest in part upon an implied agreement entered into through the corporate agents, and in part upon the positive rules of the law. There can be no doubt, however, that these rights are in all instances controlled by any actual agreement which the parties may choose to make.

Thus, persons contracting with a corporation may expressly or impliedly waive their right to compel the shareholders to contribute the full amount of the company's capital in discharge of the corporate obligations.¹

Osgood v. Laytin, 3 Keyes, 521; which cases the same rule was applied to companies with limited liability. See also *County of Morgan v. Allen*, 108 U. S. 498. *Burnes v. Pennell*, 2 H. L. Cas. 581; *Union Nat. Bank v. Douglass*, 1 McCrary, 86; *Van Dyck v. McQuade*, 45 N. Y. Super. Ct. 620.

See also *Rance's Case*, L. R. 6 Ch. 104; *Stringer's Case*, L. R. 4 Ch. 475; *Macdougall v. Jersey Imp. Hotel Co.*, 2 H. & M. 528; — in

A distribution of negotiable obligations of the corporation among the shareholders would operate as a withdrawal of capital to the amount of the value of the securities. See *supra*, § 792.

¹ *Robinson v. Bidwell*, 22 Cal. 379, 388. See also *infra*, § 871.

If a person should contract with a corporation, or voluntarily give it credit, knowing that its capital had not been fully paid up, but was declared to be fully paid up for the purpose of discharging the shareholders from further liability, the evident intention of both parties would be to make the agreement subject to these conditions; and there would be no equity in charging the shareholders with any further liability on account of the obligation so incurred by the company. So, if the capital of a corporation was declared to be fully paid up in consideration of specific property of less value than the amount of the capital, a person who should voluntarily deal with the company, knowing the character and value of the property so transferred to the company, would have no claim upon the shareholders for any further contribution of capital. By voluntarily dealing with the company under the circumstances, he must be deemed to have assented to the existing arrangement, the company and its shareholders having offered to contract only on these terms. The fact that such an arrangement is illegal, and contrary to public policy, might possibly be a ground for declaring it void, and for dissolving the corporation; but it would not be a ground for giving a creditor who assented to the arrangement rights against the shareholders for which the creditor did not stipulate, and which the shareholders never agreed to give.¹

§ 830. **The Rule as to Mining Corporations.** — While the customs of business men with regard to the methods of organizing and managing particular classes of corporations cannot control the established rules of law, such customs must often be taken into consideration in construing agreements made in view of the prevailing condition of affairs.

Thus, it has long been the general practice both in New York and in California to organize mining corporations with a nominal capital bearing little or no relation to the real capital which the shareholders propose to contribute, and to

¹ See *Coit v. North Carolina*, The latter case, however, goes too far, in holding that persons dealing with a company must at their peril ascertain its financial condition. *Amalgamating Co.*, 14 Fed. Rep. 12; *s. c.* 15 Phila. 496; *Peck v. Coalfield Coal Co.*, 11 Bradw. 88.

issue the entire stock as fully paid up in consideration of mines whose market value is much below the amount of the stock so issued, and whose real value is generally nothing. This practice is so universal and so notorious, that a person who contracts with an ordinary mining company may usually be presumed to have contracted with a view only to such security as the property transferred to the company may furnish, irrespective of the capital indicated by its charter. A person so contracting would therefore have no equitable claim against the shareholders for unpaid capital, if their shares were declared paid up as between themselves and the company.¹ It is to be observed, also, that the nominal capital of a mining company, by the very nature of the mining business, cannot as a rule furnish an indication of the company's actual capital. The property of a mining company is naturally of an extremely fluctuating and uncertain character; moreover, it is acquired for the sole purpose of being exhausted and distributed among the shareholders in the form of dividends, and not as a permanent fund with which to carry on business.²

Accordingly it was decided, in a case arising in California, that the shareholders in an insolvent mining corporation, whose capital had been declared fully paid up by the transfer of certain mining property, were not liable to make up the difference between the par value of their shares and the value of the property which had been transferred in payment of the shares, for the purpose of satisfying those who had given the company credit.³

¹ See the preceding section.

² See *supra*, § 443.

³ *Re South Mountain, &c. Mining Co.*, 7 Sawy. 80; 8 Sawy. 866.

Hoffman, J., said: "The mode in which mining companies are formed in this State is familiar to us all. The owners of the property, or persons expected to become such, by complying with a few simple formalities, form themselves, with such others as they may take

into the association, into a corporation, to which the property is conveyed. The amount of the capital stock, which is required to be stated in the certificate of incorporation, is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate. It neither bears, nor is intended nor supposed by the public to bear, the slightest relation to the real value of the property, — a value

§ 831. Creditors can only insist on Contribution of the Capital provided by the Charter. — Every creditor of a corporation, whether his claim arose by contract or otherwise, is entitled to enforce his claim, by legal process, against any assets belonging to the corporation, including the liability of its shareholders to contribute the amount of their shares. And it is immaterial whether the assets existed at the origin of the creditor's claim, or were the result of a subsequent increase of the company's capital.

In addition to this right to enforce their claims against the assets which the corporation has in its possession or can collect, creditors have certain further rights resulting from their equitable relation to the shareholders. Thus, creditors are entitled to claim from the several shareholders the measure of security for the corporate obligations which the law provides that they shall contribute or become responsible for; this right of creditors is independent of the obligations of the shareholders to the corporation or as among themselves, and it cannot be defeated by any resolution adopted by the shareholders, or any agreement made by them with agents, whom they have themselves appointed. Moreover, contract creditors have a special equity, by virtue of the implied agreement of the corporation, as common representative of all the shareholders, to provide those dealing with the company with the full security which the company's charter indicates.¹

It is clear, however, that creditors can have no equitable right against shareholders to insist on the contribution of a greater amount of actual capital than the charter provides that they shall contribute, although this may not equal the full amount of the company's nominal capital. Persons dealing with a corporation must take notice of the terms of its charter, and if the charter by its terms shows that the company's nominal capital does not indicate the amount of real

nearly always conjectural, and very body. They are, in California, as often imaginary." much a matter of universal knowledge as the principle of natural philosophy that water will seek, and, if unobstructed, find its level."

Sawyer, J., said: "The mode of forming mining corporations in this State, and the supposed liabilities assumed, are well known to every-
¹ *Supra*, §§ 781, 824 *et seq.*

capital which ought to have been contributed or subscribed, it is evident that they have no right to expect the amount of the nominal capital as security.

Hence, if the charter or laws under which a corporation was organized provide that the company may issue or sell its shares as fully paid up, on payment of less than their par amount into the company's treasury, creditors would have no equitable right to insist on having the shares paid up at par.¹

§ 832. **Equitable Rights of Creditors with Respect to a subsequent Issue of Shares.** — For the same reason, it follows that, if the charter or law under which a corporation was organized authorizes the company to carry on business and incur debts before the whole of its nominal capital has been subscribed, persons dealing with the company have no right to rely on the security indicated by the company's nominal capital, in the absence of an express representation that the entire amount has been paid up or subscribed. If the corporation should issue new shares after the claim of a creditor arose, it is clear that the latter would not have dealt with the company on the faith of the capital represented by those shares; and under these circumstances he would have no equitable right to insist on the contribution of a greater amount of

¹ See *Louisiana Paper Co. v. Waples*, 3 Woods, 34. This was an action by the trustees in bankruptcy of a corporation, to recover from a shareholder the amount unpaid on his shares. The articles of association adopted by the company, and recorded pursuant to law, provided that forty per cent of the company's nominal capital should be paid in by the shareholders in certain instalments, and then declared that "the balance on each share, or any portion of such balance, shall not be called for unless with the assent of three fourths of the shareholders, and then only to increase the business of the corporation." The law under which the company was organized provided that no shareholder should be responsible for the company's debts "in any further sum than the unpaid balance due to the company on the shares owned by him." Justice Woods held that the shareholders were not liable to creditors after the forty per cent had been paid on their shares, because the articles of association were public notice of the terms of the contract of the shareholders, and the latter could therefore only be held to do what they had agreed to do. Compare *Clarke v. Lincoln Lumber Co.*, 59 Wis. 650.

capital by the holders of the new shares, than the corporation itself could claim from them as part of its assets.¹ Whatever was contributed as capital in respect of the new shares was a clear gain to the creditors' security.

§ 833. **Rights of Creditors after an Increase or Reduction of Capital.**—If the capital of a corporation is increased by the issue of new shares after an amendment of the company's charter, it is plain that creditors whose claims arose before the increase of capital have no special equities against the holders of the new shares, and cannot compel them to contribute more capital than was legally due to the corporation itself. Subsequent creditors would have an equitable claim to have the new shares paid up in full only if the amendment of the charter indicated an addition to the company's capital to the extent of the new shares issued, and if it was expressly represented to the creditor that the new shares had actually been issued.

On the other hand, if the nominal capital of a corporation is reduced pursuant to an existing law, or by amendment of the company's charter, the equitable rights of persons who contracted with the company prior to the reduction of capital would remain unaltered;² but subsequent creditors would not be entitled to call upon the shareholders for more than the reduced amount of capital.³

¹ *Coit v. North Carolina, &c. Amalgamating Co.*, 14 Fed. Rep. 12; s. c. 15 Phila. 496, *per* Justice Bradley.

² *Re State Ins. Co.*, 14 Fed. Rep. 28. When a *limited* company reduces its capital, a creditor is entitled to have a sum impounded to pay his claim when it matures. *Re Telegraph Construction Co.*, L. R. 10 Eq. 384. See *supra*, § 814.

³ *Hepburn v. Exchange, &c. Co.*, 4 La. Ann. 87; *Palfrey v. Paulding*, 7 La. Ann. 363; *Cooper v. Frederick*, 9 Ala. 742. See *Re State Ins. Co.*, 14 Fed. Rep. 28. In this last case, a corporation by vote of its shareholders reduced its nomi-

nal capital after the shareholders had partly paid up their shares. The outstanding certificates of the shareholders were called in and cancelled, and new certificates for a smaller number of shares were issued in lieu thereof, as fully paid up. Drummond, J., held that the rights of creditors whose claims arose before the reduction of capital, as against the shareholders of that date, were not affected by the reduction, and that the claims of the prior and subsequent creditors, in respect of the funds contributed by the shareholders on their shares, must be equitably adjusted.

§ 834. Rights of Creditors under peculiar Circumstances. —

A release of the shareholders in a corporation from liability to contribute the company's capital, or a distribution of capital among the shareholders after it has been contributed, would not, taken alone, be fraudulent, if the rights of existing creditors are not impaired. Such a proceeding might be entirely proper as a means of winding up the company's business.¹ After the distribution of capital, or release of the shareholders from liability to contribute the capital, the corporation would undoubtedly have no legal right to continue its operations and incur new debts; but if new debts should nevertheless be incurred, the wrong would be in the creation of the debts under those circumstances, and not in the prior reduction of the capital.

In those cases where the consummation of a wrong to creditors can be prevented, by frustrating a prior attempt of the shareholders to reduce the company's capital, that method of doing justice should undoubtedly be adopted. By denying effect to a declaration that shares are paid-up shares, if they have not in truth been paid up, and by treating a distribution of capital as a resumption *pro tanto* of the liability of the shareholders to contribute to the amount of the company's capital, creditors are given the specific security to which they became entitled under the law.

But this method of doing justice to creditors is not in all cases practicable. Thus, if shares are declared by the regular agents of the corporation to be paid up, an innocent purchaser of the shares would not be compellable to pay them up, either for the benefit of existing or future creditors, although they had not in fact been paid up. Nor would the prior holder of the shares be liable as a contributory in respect of debts incurred by the company after his connection

¹ Compare *supra*, §§ 785, 806 *et seq.* In *McLean v. Eastman*, 21 Hun, 312, an assignee in bankruptcy sought to recover dividends which had been paid to the shareholders out of capital. The court said: "It is not alleged in the complaint, nor does the scope of the action permit an inquiry, as to whether the creditors represented by the assignee were creditors at the time of the transaction; and if not, they have no interest in the money sought to be recovered."

with the company had entirely ceased.¹ So, if a corporation whose capital has been diverted or distributed among the shareholders should, after having properly wound up its business and satisfied existing creditors, wrongfully begin business anew, and incur new debts, the holders of such debts could not recover the funds so diverted or distributed. Nor could they charge the shareholders with a liability to contribute in respect of their shares, as the latter had already been fully paid up.² Creditors would not necessarily be deprived of the means of obtaining justice under these circumstances. If they were defrauded, or otherwise wronged, by any act of the company's agents or shareholders, they would be entitled to recover compensation or damages for their losses from the wrongdoer.

§ 835. **Liability for Frauds upon Persons contracting with a Corporation.**—It has been pointed out, that every contract made by a corporation, in which the company's pecuniary responsibility is a material element, involves an implied representation that the company's capital has been provided as required by the charter, and that it has not been wilfully diverted.³ If the directors or individual shareholders of a corporation should induce persons to deal with the company, and give it credit, on the faith of this representation, before the capital indicated by the charter had in fact been provided, or after it had been dissipated or diverted, they would be individually liable for the damages caused by their fraud.

¹ Compare *Billings v. Robinson*, 94 N. Y. 415, which it obtains credit. The shareholders are the real parties in interest for whom the company's agents act.

² See *McLean v. Eastman*, 21 Hun, 312. A transferee of shares is not liable to restore capital withdrawn by the prior holder of the shares in the form of dividends. *Hurlbut v. Tayler*, 62 Wis. 607. If the capital of their company has been wholly or partly withdrawn, or otherwise become lost to creditors, except by depreciation in due course of business, the shareholders would have no right, through the corporate agents, to obtain further credit on the security of the capital indicated by their charter. Compare *supra*, §§ 781, 818 *et seq.*

There would be justice in establishing a rule, that the entire body of shareholders in a corporation must in every case make good the amount of capital held out as security to persons dealing with the company, and upon the faith of

³ See *supra*, § 781.

The measure of damage would in each case be the loss sustained by the person dealing with the company by reason of the difference between the capital which he actually received as security and that which he was entitled to expect.¹

This subject was considered by the Supreme Court of Georgia, in *Schley v. Dixon*.² The charter of a banking company provided that the company should have a capital of \$1,000,000, and that one quarter of that amount should be contributed before the bank should issue any notes. In violation of these provisions, the shares were declared paid up in consideration of notes delivered by the shareholders, and notes were issued by the bank, although not more than one thousand dollars of its capital had been paid up in specie. The bank having become insolvent, the court held that both the directors and shareholders who had caused the notes to be issued were liable to the note-holders for their losses.

The court said: "If the charter of a bank requires a certain portion of the capital stock, *in specie*, to be paid in before the directors are permitted to issue bank notes, and the directors nevertheless proceed to issue and put in circulation the bank notes, if the bank fail or become insolvent, the bill-holders and creditors may proceed at once against the stockholders for the subscribed stock not paid in, and against the directors for a breach of trust for issuing and putting in circulation notes on unpaid subscribed stock, contrary to their duty under the charter."

"The community had a right to presume that there had been a *bona fide* organization of the bank, at the time notes were issued, and to rely on the assurance which such honest

¹ In those cases where an attempted reduction or diversion of capital can be prevented from taking effect, as indicated in the preceding sections, persons dealing with the company actually receive the security which they are entitled to expect, and no damage would be done. Only those directors and shareholders who were parties to the fraud

by creating the indebtedness would be liable. See *Schley v. Dixon*, 24 Ga. 273, 279.

² *Schley v. Dixon*, 24 Ga. 273, 277, 278. See also *Moses v. Ocoee Bank*, 1 Lea (Tenn.), 399, 405; *Best v. Thiel*, 79 N. Y. 15; *Walker v. Reister*, 102 U. S. 467; *Freeman v. Stine*, 15 Phila. 37, 44; *Stratton v. Lyons*, 53 Vt. 130.

organization gave them of its ability to meet its engagements and contracts. Every person injured or losing by the flagrant abuse of the extraordinary privileges granted to the company is certainly entitled to a remedy, and, the injury being necessarily of the same nature, the remedy should be the same. In such case one creditor may sue in behalf of himself and all others standing in the same relation to the subject of the suit. Justice may be done in one suit, and where that is the case, a court of chancery will entertain jurisdiction of one case for all, rather than drive each person to a separate suit to recover his rights, which would lead to innumerable suits, and cause great delay. Suits of this sort are maintainable when the gravamen is the fraud of the defendants."¹

§ 836. *Bona fide Purchasers of Certificates for Paid-up Shares.* — The general rule is, that, if the agents of a corporation wrongfully issue certificates representing paid-up shares to a person whose shares are not paid up, the false representation will not bind the company, and the holder of the shares will remain liable. However, it is well settled that, if certificates for paid-up shares, issued by the regular agents of a company in the ordinary form, have been transferred to an innocent purchaser, the company will be bound by the statement in the certificates, that the shares were fully paid up. Under these circumstances, the company will be estopped from denying that the representations of its agents were true.²

¹ There can be no doubt that the suit in this case was properly brought on behalf of all the creditors, to recover from the shareholders the unpaid capital, this being a fund in which all the creditors were interested. But it is not clear that the court was right in the view that the proceeding could be sustained against the directors in this form to recover compensation for their fraud. The claims of the note holders against the directors were in the nature of claims for damages, each arising out of a separate transaction. It would,

however, be difficult to enforce such claims until the equitable rights of the creditors as against the shareholders had been determined, and there would be evident convenience in retaining the case as against the directors, for the purpose of adjusting the rights of all parties in one proceeding.

² See *supra*, § 806. A purchaser having notice that the shares were not paid up would not be protected. *Henkle v. Salem Manuf. Co.*, 39 Ohio St. 547.

A more difficult question arises where the equities of a creditor come in conflict with the equities of a *bona fide* purchaser of shares issued as paid-up shares by the company. A creditor is undoubtedly entitled to claim that every share of the capital, upon the security of which he gave the company credit, shall be paid in money or in money's worth; and of this right a creditor cannot be deprived by the wrongful act of the company or of its agents.

On the other hand, the custom and the convenience of trade require that a *bona fide* purchaser of shares, issued by a corporation as fully paid up, be protected from liability; and it would clearly be unjust to make the innocent purchaser of particular shares bear the whole burden of a wrong committed by the other shareholders or the common agents. It has therefore been decided that a *bona fide* purchaser of shares, issued by a corporation as fully paid up, cannot be held liable to creditors, though the shares have not in fact been fully paid up.¹

However, after a corporation and its creditors have thus lost the power of compelling its shareholders to contribute the full amount of capital indicated by the shares issued, the agents of the company can no longer honestly represent to the public that the amount of capital indicated by the shares issued had been fully paid up. Persons dealing with the company thereafter would be entitled to complain of a fraud practised upon them in regard to the amount of the capital held out to them as their security.

§ 837. **Shareholders are not responsible for Depreciation of Capital in Due Course of Business.** — It is clear that the shareholders in a corporation are not responsible to its creditors for a loss of capital caused by unsuccessful speculation or accident. The capital subscribed at the formation of a cor-

¹ *Steady v. Little Rock, &c. R. R.* W. R. 819; *McCracken v. McIntyre*, Co., 5 Dill. 848, 878, 874, where 1 Duv. (Canada) 479; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Skrainka v. Allen*, 76 Mo. 384, 392; *Brant v. Ehlen*, 59 Md. 1. Compare *Wintringham v. Rosenthal*, 25 Hun, 580.

poration is a specific fund held by the company for the purposes indicated by its charter. Creditors must be held to have contemplated that this fund may be diminished by any of the accidents which are incidental to the kind of business in which the company is engaged. In such case, the shareholders themselves are the first losers. But they do not guarantee that the capital stock shall forever remain unimpaired; their undertaking is only to pay in the amount of stock which they subscribed at the outset, for the purpose of carrying on the company's business.¹ And it is only where the capital has been wilfully withdrawn, not lost in carrying on business under the charter, that the shareholders can be compelled by creditors to restore the amount abstracted.

§ 838. *Profits may be distributed.* — The ultimate object for which every business corporation is formed is the profit of its shareholders. A corporation is under no obligation to increase its capital beyond the amount originally required by its charter; any surplus may be distributed amongst the shareholders as profits.² It is obvious that creditors cannot complain of a distribution of the surplus earned by a corporation over and above the amount of its debts and the capital invested. Profits once distributed cannot be recalled; nor are the shareholders liable to refund any dividend properly declared, if the company should afterwards become insolvent and unable to pay its debts.

In *Reid v. Eatonton Manufacturing Company*,³ Brown, C. J., said: "Establish the rule that creditors may compel the stockholders of an insolvent corporation to refund dividends received in a fair course of business, and no man would be safe in holding stock. At the time the dividends are made, the corporation may be in a prosperous condition, as was the case here, and a stockholder may receive the dividends in good faith, as the legitimate income of his capital; and, after

¹ *State v. Morristown Fire Ass.*,
28 N. J. Law, 195.

² *Reid v. Eatonton Manuf. Co.*,
40 Ga. 103.

³ As to what constitutes "profits," see *supra*. § 437 *et seq.*

he has sold his stock and ceased to have any interest in the company, some calamity may befall the company, which may cause its insolvency, and creditors under the rule contended for may compel him to repay the dividends, with interest, for their benefit. We do not think dividends already paid out are a trust fund for the payment of debts, which may be followed by creditors in a court of chancery, and recovered for that purpose."

The same doctrine was affirmed in *Stringer's Case*.¹ A dividend of twenty-five per cent had been paid to the shareholders of a "limited" company, formed under the act of 1862 for the purpose of running the blockade during the American civil war. The balance-sheet upon which this dividend was computed included debts due from the Confederate government to the company, cotton in the Confederate States, and vessels engaged in running the blockade, which were estimated at their full nominal value. The company having failed, it was held that, in view of the fact that the company was formed for the express purpose of carrying on a hazardous enterprise, and that the estimate of assets had been made openly and in good faith, and not unreasonably, at the time, the shareholders could not be compelled to return the dividend they had received, although the money to pay it had to be borrowed.

The principles of law laid down in this case are undoubtedly correct, but it is questionable whether the conclusion reached by the court was warranted by the facts.

§ 839. **Rights of Creditors against Shareholders defrauded by the Company's Agents.** — The rule that a contract obtained by fraud or false representations is voidable at the option of the innocent party, applies to the contract of a shareholder in a corporation. And therefore, if a subscription for shares in a corporation was obtained through fraud by the agent receiving it, the subscriber may repudiate his contract when called upon by the company to contribute his share of the capital.²

¹ L. R. 4 Ch. 475. Compare *Rance's Case*, L. R. 6 Ch. 104. ² *Supra*, § 94 *et seq.*

But fraud renders a contract voidable merely, and not absolutely void; until declared void by the innocent party, it remains valid and binding. Thus, it is established that, if a sale of goods be obtained by false representations, the title passes though the sale may be disaffirmed by the vendor. "But in the mean time, and until he elects, if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person."¹

When a person subscribes to the capital stock of a corporation, he must be held to contemplate and intend that the corporation shall incur debts and pledge its capital, including the liability of its members for unpaid capital, as security. Creditors who, in good faith, trust the corporation upon the faith of this security, stand in the position of innocent purchasers for value, to the extent of their equitable lien; and it would be most unjust to permit a shareholder to disaffirm his contract, and refuse to pay his share of the capital, after it has thus been pledged, with his knowledge and consent, to innocent third parties. Moreover, it should be borne in mind that the shareholders of a corporation are the real parties in interest for whom the corporate obligations are incurred. Creditors of a corporation have equitable rights against the shareholders directly, and these rights do not depend upon the agreements existing among the shareholders themselves, or their dealings with the common agents.² It has accordingly been settled, that, if a corporation is insolvent, a shareholder whose contract of subscription was obtained by the fraud of the company's agents cannot diminish the security of *bona fide* creditors, by rescinding his contract to contribute the amount of capital subscribed by him.³

¹ Benjamin on Sales (2d Am. ed.), § 433, and see cases there cited.

² See *supra*, § 818 *et seq.*

³ The leading English authority upon this subject is *Oakes v. Turquand*, L. R. 2 H. L. 325. The principle of this case was stated by

§ 840. Under the English Companies Act of 1862, the rule appears to be that a creditor is entitled to hold every shareholder liable whose name is on the register of the company at the time proceedings are instituted to wind up the company for insolvency.

In the absence of a statutory provision, the rule seems to be that a shareholder whose contract of subscription was obtained by fraud would be liable to contribute his share of the capital upon the insolvency of the company, so far as this may be required in order to satisfy those creditors whose claims attached before he elected to disaffirm his contract; but creditors who contracted with the corporation after the shareholder elected to cancel his contract and sever his connection

Bramwell, L. J., in *Stone v. City & County Bank*, L. R. 3 C. P. D. 307, to be this: "Where a company is shown by a winding up to be insolvent, and where the remedies of the creditors, who have trusted the company upon the strength of the uncalled capital and upon the names upon the register, would be interfered with by the withdrawal of members, the power to rescind a contract to take shares is gone." The Lord Justice added (on p. 308): "I doubt whether a shareholder is liable upon the ground of estoppel. I think his liability depends upon a principle similar to that upon which the decision in *Kingsford v. Merry* (11 Ex. 577) proceeded. It was there held, that if the owner of goods sells them owing to a fraudulent representation, and if, before he discovers the fraud, another person acquires some claim to them, he cannot afterwards rescind the contract. And I think it clear upon the authorities, that, whenever the rights of other persons intervene, a contract to take shares, though induced by fraud, cannot be rescinded." See also *Henderson v. Royal British*

Bank, 7 El. & Bl. 856; *Dossett v. Harding*, 1 C. B. n. s. 524; *Powis v. Harding*, Id. 533; *Daniell v. Royal British Bank*, 1 H. & N. 681; *Reese River, &c. Mining Co. v. Smith*, L. R. 4 H. L. 64; *Re Etna Ins. Co.*, 6 Ir. Rep. Eq. 298; *McNiell's Case*, L. R. 10 Eq. 508; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317. Compare *Brockwell's Case*, 4 Drewry. 205; *Ayre's Case*, 25 Beav. 513; *Blake's Case*, 34 Beav. 639; *Ex parte Ginger*, 5 Ir. Ch. Rep. 174.

In *Upton v. Englehart*, 3 Dill. 496, 508-509, the English cases were reviewed, and the principle upon which they were decided adopted by Justice Dillon in a careful opinion. See also *Farrar v. Walker*, 3 Dill. 506 n., per Justice Miller; *Michener v. Payson*, 13 N. B. R. 49; and compare *Upton v. Tribilcock*, 91 U. S. 45; *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Hamilton v. Grangers' Life, &c. Ins. Co.*, 87 Ga. 145; *Reeder v. Maranda*, 66 Ind. 486; *Turner v. Grangers' Life, &c. Ins. Co.*, 65 Ga. 649.

with the company, clearly have no lien upon the unpaid stock subscription.

In *Upton v. Tribilcock*,¹ Justice Miller, in delivering a dissenting opinion, expressed himself as follows: "I am of opinion that, where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defence to a suit for the unpaid instalments, when suit is brought by the corporation; and that, if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the corporation, the defence is valid against the assignee of the corporation."

§ 841. **Cancellation of Shares and Release of Shareholders.** —

It is clear that the shareholders in a corporation cannot, by an agreement with the company's agents, or by a resolution adopted by themselves, cancel their shares and release themselves from liability to contribute the amount unpaid on their shares in discharge of the company's existing debts. Such cancellation and release would have no effect upon the rights of existing creditors, unless they were parties to the arrangement; and in the event of the insolvency of the company, the discharged shareholders would be liable to contribute the amount unpaid on their shares.²

¹ 91 U. S. 55. Chief Justice Waite and Justice Bradley concurred in this opinion, and the majority of the court seem not to have differed from the minority with respect to the principle involved. See also *per* Justice Dillon, in *Upton v. Englehart*, 3 Dill. 505.

² *Rider v. Morrison*, 54 Md. 429; *Gill v. Balis*, 72 Mo. 425.

In *Burke v. Smith*, 16 Wall. 390, 394, Justice Strong said: "It must be conceded that, if the company has, in fraud of its creditors, released subscribers to its stock from the payment of their subscriptions, the release is inoperative to protect those subscribers against claims of

the creditors. Under the law of the State, all railroad companies are required to have a subscription to their capital stock not less than \$1000 for every mile of their proposed road, before they may exercise corporate powers. This requirement is intended as a protection to the public and to creditors of the companies. And it is clear that the directors of a company organized under the law have no power to destroy it, to give away its funds, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated. The stock subscribed is the capital of the company, its means for performing

If shareholders are, by the terms of their charter, subject to an individual liability to creditors in addition to the ordinary liability to the extent of the unpaid capital, they cannot be discharged from this liability by a release or cancellation of their shares, even though the shares may have been fully paid up, in respect of the amount of capital to be contributed by the holder.¹

However, a compromise made in good faith between a corporation and one of its shareholders, by which the subscription of the latter is cancelled, is within the powers of management retained by the corporation, and is binding upon creditors as well as upon the company itself.²

§ 842. **Conditions of Subscription as to Contribution of Capital void as to Creditors.**—The agents of a corporation, as a rule, have no authority to receive subscriptions for shares subject to conditions or collateral agreements which would enable the subscribers to enjoy the benefits of membership without assuming any liability to contribute to the company's capital. Such conditions and agreements would be fraudulent and void as against the other shareholders and the corporation representing them,³ and would, therefore, clearly be void as to creditors. But even if such conditions and agreements were assented to by all the shareholders, and were binding upon the corporation, they cannot be allowed to defeat the just expectations of creditors.

When a corporation incurs debts, it does so on behalf of its shareholders; and these must have contemplated, when

its duty to the Commonwealth and to those who deal with it. Accordingly, it has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the State shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as *ultra vires*, but as a fraud

upon other stockholders, upon the public, and upon the creditors of the company." See *supra*, § 109.

¹ Compare *Vick v. La Rochelle*, 57 Miss. 602.

² *New Albany v. Burke*, 11 Wall. 96; *Gelpcke v. Blake*, 19 Iowa, 268; *Steady v. Little Rock, &c. R. R. Co.*, 5 Dill. 348; *Lord Belhaven's Case*, 8 De G., J. & S. 41; *Putnam v. New Albany*, 4 Biss. 365. Compare *supra*, § 114.

³ *Supra*, § 87.

they agreed to become members of the company, that the latter would pledge its capital as security for the claims of its creditors. The creditors of a corporation are not privies to agreements made by its shareholders among themselves or with the corporation as a body; but they are entitled to expect that every engagement made by the corporation, on behalf of the shareholders and with their assent, shall be honestly carried out. It would be sanctioning the barest fraud to permit the shareholders, after obtaining credit for the corporation upon the faith of the capital stock indicated by their subscriptions, to deprive creditors of the full benefit of the security which they were led to expect, by means of any secret arrangement that the subscriptions should be invalid or unenforceable. The law is accordingly settled, that any condition or arrangement attached to the contract of a shareholder in a corporation, which, if carried out, would lessen the amount of capital held out to creditors as their security, is a fraud upon creditors, and will therefore be denied effect.¹

§ 843. **Unauthorized Subscriptions. — Ratification.** — It is clear that a party, whose name has been placed upon the subscription-books of a corporation without his authority or consent, cannot be charged as a shareholder, either by the company or by its creditors. The subscription would, under these circumstances, be absolutely null and void as a contract, and not merely voidable, at the option of the innocent party.²

But a person cannot allow his name to be used as a means of defrauding innocent parties; and hence, if a person is held out to the world as a shareholder in a corporation, slight acts

¹ See *Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co.*, 97 Ill. 537; *8 Eq.* 861; *Pim's Case*, 3 De G. & Upton v. Hansbrough, 3 Biss. 428; *S. 11*; 1 MacN. & G. 291; *Henee-Burke v. Smith*, 16 Wall. 396, 397; *sey's Executors' Case*, 3 De G. & S. Webster v. Upton, 91 U. S. 67, 68; 191; 2 MacN. & G. 201; *Ex parte Noble v. Callender*, 20 Ohio St. 199; *Hall*, 1 MacN. & G. 307; *Haslett v. Clarke v. Thomas*, 34 Ohio St. 46; *Wotherspoon*, 1 Strobb. Eq. 209. *Saffold v. Barnes*, 89 Miss. 399; See *supra*, §§ 62, 63. *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

of ratification will be sufficient to estop him from denying his membership, as against a *bona fide* creditor who has been misled.

In *Chapman & Barker's Case*,¹ Vice-Chancellor Page-Wood said: "It is an absurdity to say that I am to be liable because directors choose to put me down upon the register as a shareholder. . . . The case is wholly different where a person agrees to have his name put upon the register for any purpose. The creditors have a right to take as their debtor everybody who is properly upon the register, including the trustees for the company. But creditors do not therefore obtain the right of insisting upon retaining as their debtor a person whose name has been placed there by fraud or wrong, and ought never to have been there at all. An important question might arise as to how far a person, after he knows that his name has been wrongly placed upon the register, may, by acts of acquiescence, — such as accepting a dividend or the like, — be held to be liable. It is like any other case: he cannot approbate and reprobate. If, for his own convenience, he adopts the act, he must be liable for the consequences of the act. The question whether he has or has not adopted it is wholly one of degree, and of evidence for the court."

§ 844. **Who are liable as Shareholders.** — It is clear that every person who has actually become a shareholder, as between himself and the company, is liable to creditors as a shareholder, whether he has become a shareholder by complying with the formalities prescribed by the company's charter or not. A corporation may waive formalities prescribed by its charter or by-laws in making an original subscription or a transfer of shares. And if a person has been received as a shareholder, and has acted as a shareholder, and enjoyed the privileges of a shareholder, he will be estopped from denying that he agreed to become a shareholder and to assume the incidental liabilities both to the company and its creditors.²

¹ *Chapman & Barker's Case*, L.R. 8 Eq. 865, 866. Compare *McClelland v. Whiteley*, 15 Fed. Rep. 822. ² See *supra*, § 63. *Pittsburgh, &c. R. R. Co. v. Stewart*, 41 Pa. St. 54; *Holyoke Bank v. Goodman Paper*

In some instances, a person may be liable to creditors as a shareholder, although he is not in fact a shareholder and never agreed to become a shareholder. Thus, if a person should cause his name to be placed upon the stock subscription-books or register of shareholders of a company, thereby swelling the apparent list of shareholders and inducing persons to deal with the company on the faith of his liability as a shareholder, he would be estopped from denying the truth of his representations as against any person who was misled thereby, although he might not be bound as a shareholder to the company.¹

§ 845. *When Subscribers for Shares are not Liable.* — A person who is not in fact a shareholder is not liable to creditors as a shareholder unless he represented himself to be a shareholder, and the creditors dealt with the company on the faith of this representation.

Thus, if a subscription for shares by its express or implied terms does not constitute the subscriber a shareholder until after the performance of a certain condition precedent, such as the subscription of a definite amount of stock or the filing of a certificate with a public officer, the subscriber would not become a shareholder, and would not be liable to creditors, until after the condition has been performed.²

The same rule applies to any subscription for shares which does not constitute the subscriber a shareholder. In *Russell v. Bristol*³ the facts were as follows. A life insurance company was authorized to begin business as soon as \$100,000 of its capital had been subscribed. After more than that amount had been subscribed, the defendant, who was treasurer of the

Manuf. Co. 9 Cush. 576; *McHose v. Wheeler*, 45 Pa. St. 32; *Hager v. Cleveland*, 36 Md. 476; *Burnes v. Pennell*, 2 H. L. C. 497.

¹ *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Re Reciprocity Bank*, 22 N. Y. 9, 17. Compare *supra*, §§ 839, 842.

² See *supra*, §§ 78 *et seq.*, 787 *et seq.* *Banty v. Buckles*, 68 Ind. 49. How-

ever, if the subscriber should act as a shareholder, he would be deemed to have waived the conditions of his subscription and to have become a shareholder absolutely. *Supra*, §§ 78, 741 *et seq.*

³ *Russell v. Bristol*, 49 Conn. 251. See *Lathrop v. Kneeland*, 46 Barb. 482.

company, made a final subscription for 120 shares, amounting to \$12,000, as "treasurer in trust." This subscription was not intended to be binding upon the defendant personally, but was made on behalf of the company itself, and the defendant never was regarded as a shareholder. It did not appear that any person was misled by the subscription, or gave credit to the company on the faith of it. The court therefore held that the defendant was not liable as a shareholder in respect of this subscription, either to the company while it was solvent, or to its receiver in insolvency.

§ 849. **Holders of legally void Shares.** — Shares issued by a corporation in excess of the amount authorized by its charter or articles of association are legally null and void, although the holder may have acted as a shareholder. No person would be entitled to give the company credit on the faith of such excessive issue of shares, because all persons dealing with the company would be bound at their peril to take notice of the terms of its charter or articles of association. It has been held, therefore, that creditors would have no greater rights against the holders of such illegally issued shares than the company itself.¹

However, if persons dealing with a corporation give it credit on the security of the capital represented by an issue of shares, without having notice, either actual or constructive, that the shares were issued illegally, they would be entitled to charge the holders of these shares with liability, whether the corporation could do so or not.

§ 850. **Liability of Shares issued by a Corporation in Trust for itself, or as Collateral Security.** — The same principles should govern where a corporation issues shares to a trustee for itself, or to a person from whom it has borrowed money, as

¹ *Supra*, § 765. *Scovill v. Thayer*, 105 U. S. 148; *Hollingshead v. Woodward*, 85 Hun, 410. Compare *Clarke v. Thomas*, 34 Ohio St. 46; and see *supra*, § 767.

In *Scovill v. Thayer*, 105 U. S. 151, Justice Woods said: "The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company. They were bound to know that the law permitted no such increase of its capital stock as the company had attempted to make, and that any representation that it had been made was false."

collateral security for the loan. It is clear that the person to whom the shares were so issued would not be liable to the company itself as a shareholder. Why, then, should he be liable to the company's creditors? Existing creditors would certainly be deprived of no portion of their security by such an issue of shares, and future creditors would have no cause of complaint unless they were defrauded by a representation that the capital had been increased by the issue of the shares.¹

It has commonly been supposed, that a person to whom a corporation has made an original issue of shares as trustee for itself, or as collateral security for a loan, is liable to creditors as a shareholder for the same reasons as is a person to whom shares have been transferred in trust or as collateral security by a prior holder.² But the cases are not analogous. A transferee of shares steps into the place of the prior holder, and becomes in all respects a member of the company. Neither the company nor its creditors are privies to any trust or collateral obligation which he may have assumed in favor of a third party.³ On the other hand, when a corporation makes an original issue of shares to a trustee for itself, the trustee does not really become a member of the company; the issue of the shares is only nominal. It does not render the holder liable to the company, nor does it increase or diminish the amount of its capital. So, when shares are issued by a company merely as collateral security for a loan to itself, the shares are not really fully issued. The transaction merely amounts to an irrevocable grant of the power to cause the

¹ In England, if shares in a limited company are held by a trustee for the company, and the trustee's name appears on the register of shareholders, he will be liable to creditors as a shareholder, unless the shares were entered upon the register as paid-up shares. This is so by reason of the provisions of the Companies and Winding-up Acts. Under these acts, "the creditors have a right to take as their debtor

everybody who is properly upon the register, including the trustees for the company." *Per* Page-Wood, V. C., in *Chapman & Barker's Case*, L. R. 3 Eq. 365; *Re Anglesea Colliery Co.*, L. R. 2 Eq. 379; *Ind's Case*, L. R. 7 Ch. 485.

² See *Griswold v. Seligman*, 72 Mo. 110; *Wheelock v. Kost*, 77 Ill. 298.

³ See *infra*, §§ 858, 888.

shares to take effect upon the happening of a contingency, namely, the nonpayment of the loan.¹

§ 851. This subject was considered by the Supreme Court of the United States in the case of *Burgess v. Seligman*.² The plaintiff in that case was a judgment creditor of a railroad company, and the action was brought to charge the defendants with individual liability as shareholders in the company. It appeared that certificates for sixty thousand shares, amounting to \$6,000,000, had been delivered to the defendants, and they appeared upon the books of the company as the holders of sixty thousand shares "held in escrow." The circumstances under which the shares had been issued to the defendants were as follows. The company, being about to begin the construction of its road, selected the defendants as its financial agents, and made an agreement with them for the purpose of disposing of its bonds and obtaining advances from time to time to enable it to purchase material and construct its railroad. As security for these advances, the company executed a mortgage securing an issue of bonds, and deposited the entire issue of bonds, together with a majority of its shares, with the defendants. It was agreed that the defendants should have the privilege of purchasing the bonds at a fixed price, and that they should be entitled to hold the shares in trust for one year at least. The shares were issued to the defendants solely for the purpose of giving them the power to control the company's management, and thereby prevent a misapplication of the moneys supplied by them, and the consequent loss of their security. The court held that the defendants were not liable as shareholders, although they had voted on the shares at corporate meetings.

This decision was clearly right.³ The defendants never

¹ This applies only to an original issue of shares. If shares once issued are transferred to a trustee for the corporation, the trustee would assume the liability of the prior holder; otherwise, a reduction of capital would take place.

² *Burgess v. Seligman*, 107 U.S. 20.

³ The decisions of the Supreme Court of Missouri in cases arising out of the same transactions, and against the same parties, are to the contrary. See *Griswold v. Seligman*, 72 Mo. 110; *Fisher v. Seligman*, 75 Mo. 13.

became absolutely shareholders in the company; the substance of the transaction was merely to give them temporary control over the company's management, by suspending the power of the company to issue the majority of its shares to other persons. If the plaintiff had been induced, by the defendants' apparent subscription on the books of the company, to believe that they had really become the holders of sixty thousand shares subject to a liability to contribute \$6,000,000 of the company's capital, and if he had given credit to the company on that assumption, a different rule would have prevailed. But the evidence showed that this was not the case.

§ 852. *The Legal Owner of Shares is Liable. — Trusts and collateral Agreements.* — The members of a corporation are entitled, as among themselves, to hold every person having the legal title to shares liable to perform all the duties of a shareholder; and a collateral agreement or trust existing between a shareholder and third persons cannot be allowed to alter the relation existing between himself and the corporation.¹ Hence it is clear that creditors are always entitled to compel the legal owners of shares to pay their unpaid stock subscriptions; for such stock subscriptions are a portion of the assets belonging to the company, and pledged to creditors for the payment of their claims. Moreover, creditors have an equitable right to hold the legal owners of shares liable, by reason of the direct relation existing between such shareholders and themselves. A corporation and its shareholders are in reality the same; and when the agents of a corporation create corporate obligations, they do so for the benefit of its shareholders, and on their behalf pledge the company's assets, including the liability of its shareholders, as security. To allow any agreement or relationship between the shareholders and third parties to impair the security thus given through the corporation, would be contrary to the agreement made with creditors, and a violation of their equitable rights.² It has accordingly been held, that the creditors of a corporation are entitled to hold every legal owner

¹ *Supra*, § 304.

² See *Des Moines Gas Co. v. West*, 50 Iowa, 16.

of shares liable as a shareholder, without regard to equities existing between him and third persons, and may enforce not only the liability of such shareholder to contribute the portion of capital subscribed by him to the company, but also any further liability to creditors imposed by statute.

This rule has been enforced against trustees holding shares for the benefit of others,¹ and against persons to whom shares have been transferred as collateral security for a claim against the prior holder.²

§ 858. **Liability of Equitable Owners of Shares.**—Where shares are held by a person as trustee for another, the legal holder of the shares, and not the equitable owner, is primarily liable both to the company and to its creditors. Neither the company nor its creditors would be entitled to charge the equitable owner as a shareholder.³

¹ Hoare's Case, 2 J. & H. 229; Bugg's Case, 2 Dr. & Sm. 452; Williams's Case, L. R. 1 Ch. D. 576; Mitchell's Case, L. R. 9 Eq. 363; King's Case, L. R. 6 Ch. 196.

² See First Nat. Bank v. Hingham Manuf. Co., 127 Mass. 563; Moore v. Jones, 3 Woods, 58; Pullman v. Upton, 96 U. S. 328; Adderly v. Storm, 6 Hill, 624; Roosevelt v. Brown, 11 N. Y. 148; Matter of Empire City Bank, 18 N. Y. 223; Magruder v. Colston, 44 Md. 349; Matter of Reciprocity Bank, 22 N.Y. 17; Crease v. Babcock, 10 Metc. (Mass.) 545; Holyoke Bank v. Burnham, 11 Cush. 183; Stover v. Flack, 80 N. Y. 64; Wheelock v. Kost, 77 Ill. 298. See also Price & Brown's Case, 3 De G. & S. 146; Addison's Case, L. R. 5 Ch. 294; Royal Bank of India's Case, L. R. 7 Eq. 91; L. R. 4 Ch. 252; Weikersheim's Case, L. R. 8 Ch. 881.

In National Bank v. Case, 99 U. S. 628, 631, Justice Strong said: "It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral se-

curity for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. . . . For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that, after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder."

³ See Williams's Case, L. R. 1 Ch. D. 576; Bugg's Case, 2 Dr. & Sm. 452; Sichell's Case, L. R. 3 Ch. 119; Henkle v. Salem Manuf. Co., 39 Ohio St. 547; Branson v. Oregonian Ry. Co., 10 Oreg. 278; and see the preceding section.

In many instances, however, the equitable owner would be under an obligation to his trustee to indemnify him against loss, and to discharge any liability which he may incur by reason of his title to the shares.¹ Equities of this character existing between a trustee of shares and the beneficial owner cannot affect the rights of creditors against the actual holder of the shares; but it seems not to be settled whether creditors would be entitled to proceed against the equitable owner of the shares jointly with the legal owner, for the purpose of adjusting these equities, and charging the equitable owner with the liability which he ought ultimately to bear.²

§ 854. Statutes have been passed in some of the States, making the equitable owners of shares liable in place of the legal holders. Thus, in New York, the general act for the incorporation of railroad companies provides that "No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian, or trustee shall be liable in like manner, and to the same extent, as the testator, or intestate, or the ward, or person interested in such trust fund would have been, if he had been living and competent to act, and held the same stock in his own name."³

A similar provision has been enacted in Maryland⁴ and in Missouri. The Supreme Court of Missouri held that the act

¹ *Cruse v. Paine*, L. R. 6 Eq. 641; L. R. 4 Ch. 441; *Butler v. Cumpston*, L. R. 7 Eq. 16; *James v. May*, L. R. 6 H. L. 328; and see *supra*, § 175; *infra*, § 836 n.

² Compare *Re National Financial Co.*, L. R. 3 Ch. 791; *Hemming v. Maddick*, L. R. 9 Eq. 175; *Fenwick's Case*, 1 De G. & S. 557; *Wheeler v. Faurot*, 37 Ohio St. 26.

In England, under the provisions of the Companies Acts, only those persons who are shareholders on the register can be put on the list of contributaries.

³ Laws of 1850, ch. 140, § 11. *McMahon v. Macy*, 51 N. Y. 155.

⁴ *Matthews v. Albert*, 24 Md. 527.

of that State did not exempt from liability a person to whom shares had been originally issued by the corporation as collateral security for advances.¹ But this view was disapproved of by the Supreme Court of the United States.²

§ 855. *Shares held in the Name of a Person who is not a Shareholder.* — A person will not be permitted to defraud the public by holding shares under a fictitious name, or the name of a person who for any reason is not legally responsible as a shareholder, to contribute in respect of the shares. If shares are so held, the real owner will be liable to creditors as if he had assumed the name in which the shares stand upon the company's books.

In Cox's Case³ this principle was applied against a promoter of a company, who had taken a number of shares and placed them in the names of various persons, in order to swell the apparent number of shareholders, and thus to deceive the public.

It has likewise been held, that, where shares are taken in the name of an infant, who may disaffirm his contract with the company if it prove unprofitable,⁴ or in the name of a married woman, who cannot make a binding contract at common law,⁵ the real owner may be held liable as if he had taken the shares himself under a fictitious name.

§ 856. *Defective Transfers. — Equitable Assignments.* — If an attempted transfer of shares is ineffective to pass the title to the transferee, the original owner will remain liable to contribute his proportion of the capital stock, as if no attempt to transfer had taken place.⁶ Upon the same principle, it follows

¹ *Griswold v. Seligman*, 72 Mo. Marsh. 634; *Weston's Case*, L. R. 110. 5 Ch 614; *Richardson's Case*, L. R. 19 Eq. 588.

² *Burgess v. Seligman*, 107 U. S. 20. A person receiving shares under these circumstances would ordinarily not be liable, irrespective of the statute. See *supra*, § 851.

³ *Cox's Case*, 4 De G., J. & S. 53. Compare *King's Case*, L. R. 6 Ch. 196.

⁴ *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Roman v. Fry*, 5 J. J.

⁵ *Pugh & Sharman's Case*, L. R. 13 Eq. 566.

⁶ *Cartmell's Case*, L. R. 9 Ch. 691; *Heritage's Case*, L. R. 9 Eq. 5; *Henessey's Executors' Case*, 3 De G. & S. 191, 2 MacN. & G. 201, where the transfer had not been accepted by the transferee.

that, if shares are transferred to an infant, and the latter elects to disaffirm the contract, or if the company proves insolvent before the infant has become of age, (in which case a disaffirmance may be implied,) the transferor will remain liable.¹

An agreement to transfer shares, or an attempted transfer, although valid as between the parties, does not affect the rights of the company or of its creditors, unless the legal title to the shares was altered.² And therefore, if formalities are made necessary, by the charter of a corporation, to a transfer of membership in the company, these formalities must be complied with; otherwise, the original holder will continue liable to the company and to creditors, though the transfer be valid as between the parties, and a trust be created in favor of the transferee. Thus, where a register of shareholders or transfer-book is provided by the charter of a corporation for the purpose of determining the membership of the company, an entry upon the register or transfer-book is essential in order to discharge a transferor from liability to the company and creditors. A mere assignment of the certificate representing shares would neither discharge the existing holder of the shares from the liabilities of a shareholder nor render the assignee liable either to the company or to creditors.³

¹ *Capper's Case*, L. R. 3 Ch. 458.

² *Supra*, § 170.

³ *Shellington v. Howland*, 58 N. Y. 371; *Johnson v. Underhill*, 52 N. Y. 208; *Worrall v. Judson*, 5 Barb. 210; *Dane v. Young*, 61 Me. 160; *Musgrave & Hart's Case*, L. R. 5 Eq. 198; *Marino's Case*, L. R. 2 Ch. 596; *Humby's Case*, 5 Jur. n. s. 215. Compare *Upton v. Burnham*, 3 Biss. 431, 520; *Wehrman v. Reakirt*, 1 Cinn. Sup. Ct. 280; *Jones v. Latham*, 70 Ala. 164.

Where shares of stock are assigned without a compliance with the formalities necessary to a transfer of the legal title, the vendor will

be treated as trustee for his vendee; and the vendor may, in such case, recover from the vendee any payments which he may have been compelled to make on account of the shares standing in his name. See *Johnson v. Underhill*, 52 N. Y. 208; *Walker v. Bartlett*, 18 C. B. 845; *Grissell v. Bristowe*, L. R. 3 C. P. 112; *Coles v. Bristowe*, L. R. 4 Ch. 3; 6 Eq. 149; *Allen v. Graves*, L. R. 5 Q. B. 478; *Paine v. Hutchinson*, L. R. 3 Eq. 257; 3 Ch. 388; *Hawkins v. Maltby*, L. R. 6 Eq. 505; 4 Ch. 200; *Kellock v. Enthoven*, L. R. 9 Q. B. 241, and 8 Q. B. 458; *Bowring v. Shepherd*, L. R. 6 Q. B.

§ 857. *Discharge of Shareholder by Forfeiture.* — If a corporation has authority by its charter to declare a forfeiture of the shares of a stockholder on account of a nonpayment of his stock subscription, a forfeiture validly declared puts an end to the liability of the subscriber; and in such case creditors have no right to hold the expelled member liable if the company should afterwards become insolvent.¹

But the power of declaring a forfeiture of shares is conferred upon a corporation solely for the purpose of compelling the subscribers to pay their dues promptly, and thus to increase the amount of the common fund. It was not conferred, and cannot be exercised, for the purpose of discharging stock subscribers from liability to creditors, in case the company should prove a failure. *Unpaid shares in an insolvent*

309; *Wynne v. Price*, 3 De G. & S. 810. Compare *Humble v. Langston*, 7 M. & W. 517; *Sayles v. Blane*, 14 Q. B. 205; *Brigham v. Mead*, 10 Allen, 245.

The rule stated in the text clearly applies in those cases where the corporation has the power to refuse its assent to a transfer of membership, and has prevented a proposed transfer by the exercise of this power. *Shipman's Case*, L. R. 5 Eq. 219; *Holden's Case*, L. R. 8 Eq. 444. But if a corporation is bound to receive a transferee, and the agents of the company neglect to register the transfer, in accordance with their duty, it seems that the name of the transferee may be substituted for that of the transferor, even after the company has become insolvent. *Chouteau Spring Co. v. Harris*, 20 Mo. 382, 390.

The rule applying to English companies under the act of 1862 was stated in *Lindley on Partnership* (4th ed.), 1412, as follows: "Where, before the commencement of the winding up, shares are *bona fide* sold, and the transfer has been exe-

cuted by both transferor and transferee, and has been left for registration at the company's office, and there has been no unnecessary delay on either side in completing the transfer, and nothing remains to be done except to register it, and the company, having had an opportunity of registering, have neglected, but not declined, to do so, — under these circumstances the court will allow, and indeed order, the transferee's name to be substituted for that of the transferor, unless there is some good reason why the transfer should not be completed." *Nation's Case*, L. R. 3 Eq. 77; *Weston's Case*, L. R. 4 Ch. 20; *Fyfe's Case*, L. R. 4 Ch. 768; *Lowe's Case*, L. R. 9 Eq. 589.

¹ *Mills v. Stewart*, 62 Barb. 444; 41 N. Y. 384; *Macaulay v. Robinson*, 18 La. Ann. 619; *Allen v. Montgomery R. R. Co.*, 11 Ala. 450; and see *supra*, § 124.

But in England, under the Companies Acts, a shareholder whose shares have been forfeited remains liable as a past member. *Creyke's Case*, L. R. 5 Ch. 63.

corporation, or a corporation which has lost a portion of its original capital, are clearly of no value, but are a burden to the owner; and to declare them forfeited would be a benefit rather than a loss. To say that a corporation, when insolvent, can declare a forfeiture of the shares of its members, would, in effect, mean that the members of a corporation may, under the corporate name and for their own benefit, incur debts upon the faith of their subscriptions, and afterwards, if the company should prove a failure, annul their liability, leaving creditors unpaid, by going through the form of declaring a forfeiture of their shares, in the corporate name.¹

§ 858. *Discharge of Shareholders by Transfer.* — A transfer of shares in a corporation involves a complete novation of the contract of membership; the transferee of the shares steps into the shoes of the prior holder, and becomes invested with his rights as a shareholder, together with the corresponding liabilities. If the original holder has not performed his contract to contribute the amount of his stock subscription, this liability will, after a complete transfer, rest upon the transferee. No portion of the unpaid capital of the company is thereby lost to creditors, but only a substitution of debtors takes place; and existing as well as future creditors are bound by this alteration of the fund provided for their security.² However, after the insolvency of a corporation, the equitable lien of creditors upon the company's assets, including the liability of its shareholders for unpaid capital, can be discharged only by a transfer in due course of business, and for value.³ This rule is founded upon a plain principle of justice, and applies with full force to an assignment of the liability of a shareholder by a transfer of shares.

In *Johnson v. Laffin*,⁴ Judge Dillon said: "While we maintain the right of a shareholder to dispose of his shares

¹ *Mills v. Stewart*, 62 Barb. 444. *Ingham*, 49 N. Y. 220; *Cowles v.*

² *Supra*, § 159. *Allen v. Montgomery R. R. Co.*, 11 Ala. 451; *Cromwell*, 25 Barb. 414.

Jackson v. Sligo Manuf., &c. Co., 1 ³ *Supra*, § 790 *et seq.*

Lea (Tenn.), 210; *Billings v. Robinson*, 94 N. Y. 415; *Isham v. Buck-* ⁴ *Johnson v. Laffin*, 5 Dill. 65; s. c. 6 Cent. L. J. 181.

absolutely by an out and out sale and registered transfer, and thus escape liability, provided the sale is made *bona fide*, and the purchaser is in law capable of assuming the liabilities of the transferor, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferor knows will make the transfer, if sustained, work a fraud upon the other shareholders or upon the creditors of the bank."

Accordingly, it has been decided that the shareholders in a corporation cannot, after obtaining credit upon the faith of their stock subscriptions, escape liability after their speculation has proved a failure, and the company become insolvent, by transferring their shares to a person who is insolvent, or otherwise unable to perform the obligations of a shareholder. A transfer executed under these circumstances is fraudulent and void as against the creditors of the company.¹

§ 859. *Effect of a Transfer under the English Companies Acts.* — The shareholders in many of the earlier English joint-stock companies were liable to creditors, after transferring their shares, to the same extent that outgoing partners are liable to the creditors of a firm. As among the shareholders themselves, however, the existing members were generally bound to indemnify those who had ceased to be members of the company.

Under the Winding-up Act of 1848-49 past members were not put upon the list of contributaries at all, except when necessary to apportion among themselves their liability to creditors.²

The Companies Act of 1862, § 38, provides that, upon the winding up of a company formed under that act, every pres-

¹ *Nathan v. Whitlock*, 3 Edw. Ch. 215; 9 Paige, 152; *Bowden v. Johnson*, 107 U. S. 251; *Bowden v. Santos*, 1 Hughes (U. S.), 158; *Davis v. Stevens*, 17 Blatchf. 259; *Central Agr., &c. Ass. v. Alabama, &c. Ins. Co.*, 70 Ala. 120; *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; *Provident Sav. Inst. v. Jackson Place, &c. Rink*, 52 Mo. 557; *Man-*
dion v. Firemen's Ins. Co., 11 Rob. (La.) 177; *Re Bachman*, 12 N. B. R. 223; *Veiller v. Brown*, 18 Hun, 571; *Gaff v. Flesher*, 83 Ohio St. 107; *Rider v. Morrison*, 54 Md. 429. See also *supra*, § 166.
² See *Sutton's Case*, 3 De G. & S. 262; *Holme's Case*, 4 De G. & S. 312. Compare *Gouthwaite's Case*, 3 MacN. & G. 187.

ent and every past member shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company, subject, however, to the following, amongst other qualifications: (1.) No past member shall be liable to contribute to the assets of the company, if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up. (2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. (3.) No past member shall be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this act. In winding up under this act, as under the act of 1848, past members are not put upon the list of contributaries until the present members have been exhausted.¹

Under these acts, it has been held that a shareholder may transfer his shares at any time before proceedings to wind up the company have been begun; and the transferor will not be liable as a shareholder, although the transfer was made to an irresponsible person for the sole purpose of avoiding liability.² But it also held that, "notwithstanding there is a transfer in form, the transferor will be held a contributory if the evidence shows not only that the transfer was made to get rid of liability, but that the transfer was not a real transaction, and was not intended to divest the interest of the transferor, and to render the transferee the *bona fide* owner of the shares, but that the transferee held them subject to the orders of the transferor; and although it cannot perhaps be denied that, in the cases in question, the relation of trustee and *cestui que trust* was created, it is obvious that the sole object of the trust was to screen the transferor from liability. The cases show that such devices will not have the effect desired by the persons who practise them."³

¹ Wright's Case, L. R. 12 Eq. 331, 346.

² See cases *supra*, § 167.

³ Lindley on Partnership (4th Lond. ed.), 1404, 1405, quoted with approval by Lord Justice James in

In considering the English cases on this subject, it should be borne in mind that the security of the creditors of an English joint-stock company, unless it be a limited company, is not a specific fund, as in case of an American corporation, but consists of the individual liability of the shareholders, as in case of a copartnership. Moreover, creditors can generally charge persons who have transferred shares after insolvency, as past members. The courts in these cases were therefore only called upon to settle the equities existing among the shareholders themselves.¹

§ 860. **Remedies of Creditors.** — The general rule is, that creditors of a corporation have no other remedies for the enforcement of their claims than the creditors of an individual. At common law, they can enforce their legal claims only by actions at law, and their equitable claims by proceedings in equity; and they can reach equitable assets belonging to the company only by a creditors' bill, after having obtained judgment against the corporation.²

Ordinarily, creditors of a corporation have no greater rights against their debtor than the creditors of an individual would have. They cannot meddle with the company's management, and can reach the company's property only in pursuance of a judgment or decree by the usual process.³

King's Case, L. R. 6 Ch. 199; Hyam's Case, 1 De G., F. & J. 75; Chinnock's Case, Johns. V. C. 714; Costello's Case, 2 De G., F. & J. 302; *Ex parte* Kintrea, L. R. 5 Ch. 95; Gilbert's Case, Id. 559; Hatton's Case, 8 Jur. n. s. 380; Budd's Case, 30 Beav. 143, affirmed 8 De G., F. & J. 297. Compare Williams's Case, L. R. 1 Ch. Div. 576.

¹ In Costello's Case, 2 De G., F. & J. 303, Lord Justice Turner said: "I do not see how, when the contract between the partners is that each may transfer his shares, any one partner can have a right to complain of another for making that transfer at a time when the company may happen to be involved in

difficulties. That was the principle upon which the case of *De Pass* was decided, and by that principle I abide." Compare *De Pass's Case*, 4 De G. & J. 544; Hyam's Case, 1 De G., F. & J. 75, 78; Chappell's Case, L. R. 6 Ch. 902.

In *Re Phillips*, 18 Beav. 629, Lord Romilly said: "The object of the winding-up act was only to settle the equities between the partners, in order that, when the partnership was wound up, they might obtain contribution from each other."

² *Taylor v. Bowker*, 111 U. S. 110; *Terry v. Anderson*, 95 U. S. 636; *Blake v. Hinkle*, 10 Yerg. 218; *Sturges v. Vanderbilt*, 73 N. Y. 384.

³ See *supra*, § 782.

However, if a wilful diversion or waste of the corporate assets, in violation of the equitable rights of creditors, is threatened, a court of equity will grant a remedy; and under these circumstances it is immaterial whether the complainants be simple contract or judgment creditors, and whether the company's assets be legal or equitable. Thus, a court of equity will issue an injunction and appoint a receiver in order to protect creditors of a corporation from irreparable injury by waste or misapplication of the company's assets, even though their claims have not yet matured.¹

Where no judgment at law can be obtained against the corporation, as in case of a dissolution, it is clear that a court of equity will enforce the lien of creditors directly upon any assets which can be reached.²

§ 861. *Right of Creditors to ratable Distribution after Insolvency. — Set-off by Shareholders.* — In considering the equitable remedies of the creditors of an insolvent corporation it is necessary to bear in mind the equities existing among the creditors themselves. Creditors of a corporation have similar rights against the fund provided for their common security; and if the corporation has become insolvent, and its assets are not sufficient to pay all of its debts in full, each creditor is equitably entitled to receive a ratable share of the assets which remain.³

It follows, for this reason, that after proceedings have been instituted to obtain a general distribution of the assets of an insolvent corporation among its creditors, the shareholders

¹ See *supra*, § 797.

It seems that, if a corporation is wholly insolvent, and has ceased to carry on business and to administer or take charge of its remaining assets, whether legal or equitable, any creditor may sue in equity to prevent the loss of his security through waste, and to secure an equal distribution of the assets among all the company's creditors. See *Salmon v. Hamborough Co.*, Cas. in Ch. 204; *Bank of St. Mary's v. St.*

John, 25 Ala. 566; *Bank of Virginia v. Adams*, 1 Parsons Sel. Cas. in Eq. 534, 542; *Hodges v. Silver Hill Mining Co.*, 9 Oreg. 200; *Dodge v. Pyrolusite, &c. Co.*, 69 Ga. 665; *Adler v. Milwaukee, &c. Brick Co.*, 18 Wis. 61, 62.

² *Terry v. Anderson*, 95 U. S. 636. *Infra*, § 1035.

³ With regard to the power of the corporation to make preferences, see *supra*, § 802 *et seq.*

cannot, when sued for the amounts unpaid upon their shares, set off debts due to them by the corporation. Under these circumstances, they must pay up their shares in full, and are entitled only to a ratable distribution of all the company's assets, and to receive dividends upon their claims in common with the other creditors. This rule was settled by the Supreme Court of the United States in *Sawyer v. Hoag*, Justice Miller saying: "The debts must be mutual,—must be in the same right. The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally, in equity, to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."¹

§ 862. However, this rule applies only if the corporation is insolvent, and the contribution of the unpaid capital is

¹ *Sawyer v. Hoag*, 17 Wall. 610, 922. See also *Soovill v. Thayer*, 105 U. S. 143, 152; *Bissitt v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353; *Wilbur v. The Stockholders*, 18 N. B. R. 178; *Bristol Milling, & Co. v. Probasco*, 64 Ind. 406; *Cochran v. Ocean Dry Dock Co.*, 30 La. Ann. 1865; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Goodwin v. McGehee*, 15 Ala. 246; *Lawrence v. Nelson*, 21 N. Y. 158; *Hillier v. Allegheny County, &c. Ins. Co.*, 3 Pa. St. 470; *Long v. Penn Ins. Co.*, 6 Pa. St. 421.

The same rule applies to limited companies in winding up under the act of 1862. See *Grissell's Case*, L. R. 1 Ch. 528, 536, *per* Lord Chelmsford; *Barnett's Case*, L. R. 19 Eq. 449. With regard to the rule in bankruptcy, see *Re Duckworth*, L. R. 2 Ch. 578, and *Strang's Case*, L. R. 5 Ch. 492. Compare

Tallmadge v. Fishkill Iron Co., 4 Barb. 382, 392; *Whitwell v. Warner*, 20 Vt. 425; *Lexington, &c. Ins. Co. v. Page*, 17 B. Monr. 412; *Belcher v. Willcox*, 40 Ga. 391; *Life Association v. Levy*, 33 La. Ann. 1203.

As to the method of adjusting the rights of shareholders who are also creditors of the corporation, see *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777; and see *infra*, § 898.

A shareholder who has received dividends out of the capital of the company cannot, when sued by a receiver for the benefit of creditors, set off a claim as creditor of the corporation. *Osgood v. Ogden*, 4 Keyes, 70.

It has been held that a shareholder who has a claim against the corporation may be preferred by the latter in an assignment for creditors. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 489.

demanding from the shareholder for the purpose of making a general distribution among all the company's creditors. It applies in general in winding up proceedings, and in suits brought by receivers and assignees appointed for the benefit of creditors in general, but not in the case of an ordinary creditors' bill brought by a single creditor.¹

The legal right of an ordinary debtor of a corporation to set off debts due to him from the company seems never to have been denied, even where the company was insolvent and in process of winding up. There are manifest reasons why such a doctrine ought not to be established.

§ 863. *How Ratable Distribution is secured.* — It is settled by authority that an insolvent corporation may, by virtue of its general power of managing its assets, make an assignment preferring particular creditors to others. This rule, however, cannot be defended on principle, and must be regarded as an exceptional limitation of the general doctrine, that creditors of an insolvent corporation have a right to a ratable distribution of its assets.² After a corporation has become insolvent, and has ceased to carry on its regular business, the managing agents occupy a trust relation towards the company's creditors with regard to the control and disposition of the remaining assets.³ Under these circumstances, it is their right and their duty to protect the equitable rights of all the creditors equally, and to prevent particular creditors from obtaining an unjust advantage by satisfying their claims in full to the exclusion of other creditors. The managing agents of an insolvent corporation which has ceased to carry on business may either distribute its assets voluntarily, or apply for the appointment of a receiver and a distribution under the supervision of a court of equity. But if particular creditors should threaten to obtain an advantage over other creditors, by proceedings in attachment or other legal remedies, it is the duty of the managing agents to apply immediately to the court to secure a general distribution for the benefit of all the creditors. If the managing agents

¹ Compare *Wheeler v. Millar*, 90 N. Y. 354.

² *Supra*, §§ 802, 803.

³ *Supra*, § 887.

fail to do their duty in this respect, and particular creditors threaten to secure an undue share of the assets, to the exclusion of the other creditors, the latter are entitled to apply directly to a court of equity for the appointment of a receiver and a ratable distribution of the company's assets under supervision of the court.¹

§ 864. *Creditors' Bills.* — However, a creditor of an insolvent corporation is entitled to pursue the ordinary legal and equitable remedies for the enforcement of his claims, unless he is restrained from doing so at the suit of the corporation, or of other creditors. Neither the corporation nor other creditors would be able to prevent him from pursuing the ordinary remedies given to creditors, except by instituting proceedings for the purpose of securing a general distribution of the company's assets, and by obtaining the appointment of a receiver, or at least a restraining order. It would be productive of the greatest inconvenience, and in many cases amount to a denial of justice, to require a judgment creditor of an insolvent corporation to bring in all other creditors, and take an account of the company's assets and liabilities, before obtaining payment of his claim. There would clearly be no reason for bringing in other creditors where the corporation is solvent, or where all the creditors can obtain payment of their claims in full by proceeding against the shareholders individually. And even where the corporation is insolvent,

¹ *Adler v. Milwaukee, &c. Brick Co.*, 13 Wis. 62, 68; *Marr v. Bank of West Tennessee*, 4 Coldw. 475; *Osgood v. Laytin*, 3 Keyes, 521. See also *Morgan v. New York, &c. R. R. Co.*, 10 Paige, 290; *De Peyster v. American Fire Ins. Co.*, 6 Paige, 486; *Mann v. Pentz*, 3 N. Y. 415; *Robinson v. Bank of Darien*, 18 Ga. 65, 108. See also *Innes v. Lansing*, 7 Paige, 583, and *White-wright v. Stimpson*, 2 Barb. 379, which were cases of limited partnerships.

The same principle applies where an individual liability is imposed

upon the shareholders, for the security of all the creditors. *Pfohl v. Simpson*, 74 N. Y. 187; and see *infra*, § 897.

It seems that where an ordinary creditors' bill is filed by a single creditor, the corporation may prevent the complainant from securing an undue share of the assets, if these are not sufficient to pay all the creditors in full, by applying for a general distribution and the appointment of a receiver. *Marr v. Bank of West Tennessee*, 4 Coldw. 471, 483-486. Compare the next section.

and all creditors cannot be fully satisfied, any one may protect his rights, either by joining in the suit, or by obtaining the appointment of a receiver, and a general distribution on behalf of all the parties interested.

It has been held, therefore, that a judgment creditor of an insolvent corporation may obtain satisfaction of his claim by an ordinary creditors' bill, and that the proceedings in such case may be carried on like a creditors' bill upon a judgment obtained against an individual. Other creditors *may* come in as parties; but if they do not come in, a distribution may be made without regard to their claims.¹

An execution may undoubtedly be levied upon the property of a corporation, although it be insolvent at the time, unless a receiver or assignee in bankruptcy of the company's property has been appointed, or a restraining order has been issued in a proceeding to wind up the company. The same is true of an attachment before judgment, or garnishee process in aid of an execution, where these remedies have been provided by statute.

The appointment of a receiver or assignee in bankruptcy after an execution has been levied on property of a corporation would clearly not affect the right of the execution cred-

¹ *Bartlett v. Drew*, 57 N. Y. 587; *Kansas Mech., & Co.*, 38 Ark. 17. *Hatch v. Dana*, 101 U. S. 210; Compare *Robinson v. Bank of Darien*, 18 Ga. 65. This may be true in case of a simple creditors' bill; but if the suit is a general proceeding for the distribution of the company's assets, all the creditors are entitled to share ratably. Under a statute providing that the shareholders in a corporation should be liable "for the indebtedness of such corporation" to the amount unpaid on their shares, it has been held that a single creditor cannot enforce the liability of a shareholder, but that a general distribution is necessary. *Ladd v. Cartwright*, 7 Oreg. 329; *Patterson v. Lynde*, 106 U. S. 519.

It has been held that the judgment creditor first suing is entitled to priority of payment out of the assets recovered. *Miers v. Zanesville, & Turnpike Co.*, 18 Ohio, 197; 11 Ohio, 273; *Jones v. Ar-*

itor to be paid out of the property levied upon. Whether the lien of an attachment levied upon assets of an insolvent corporation is affected by the subsequent appointment of a receiver or assignee, depends upon the provisions of the statute conferring the remedy by attachment. The general rule appears to be, that after the lien of an attachment has vested upon property of a corporation, it will not be divested by subsequent proceedings for winding up the company, unless the contrary be expressly provided.¹

§ 865. **Judgment against the Corporation is conclusive.**—The recovery of a judgment against a corporation establishes conclusively the plaintiff's right to satisfy his judgment out of any assets belonging to the corporation;² and the validity of the judgment cannot be collaterally attacked, either by the corporation or by persons who may be in possession of its assets. This rule applies with full force where a judgment creditor of a corporation seeks to recover the capital subscribed by the shareholders; for the shareholders, being represented by the corporation, have really had their day in court.³ However, the shareholders in a corporation are entitled to impeach a judgment against the corporation by a direct proceeding, for any cause which would enable the corporation itself to impeach it.⁴ Other creditors of the corporation would also be entitled to impeach the judgment by a direct proceeding on the ground of fraud, if payment

¹ In *Re Glen Iron Works*, 20 Fed. Rep. 674, affirming 17 Fed. Rep. 324, it was held that the lien of judgment creditors of an insolvent corporation, who had levied writs of attachment execution under the laws of Pennsylvania, was not affected by the subsequent appointment of an assignee in bankruptcy of the corporation.

² This does not apply to property acquired by exercise of the power of eminent domain; such property is subject to a trust in favor of the public. See *infra*, § 1118.

³ *Stephens v. Fox*, 83 N. Y.

313; *Coalfield Co. v. Peck*, 98 Ill. 139; *Clapp v. Peterson*, 104 Ill. 26; *Henry v. Vermillion, &c. R. R. Co.*, 17 Ohio, 187; *Bissitt v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353, and note, p. 360; *Burgess v. Seligman*, 107 U. S. 20; *Wetherbee v. Baker*, 85 N. J. Eq. 501; and see *infra*, § 886. Compare *Whittlesey v. Frantz*, 74 N. Y. 456; *Hastings v. Drew*, 76 N. Y. 9; *Chesnut v. Pennell*, 92 Ill. 55.

⁴ *Conway v. Duncan*, 28 Ohio St. 102; *Bank of Wooster v. Stevens*, 1 Ohio St. 233, and cases in the preceding note.

of the judgment out of the company's assets would prevent their own claims from being satisfied in full, or would reduce their distributive shares.

§ 866. *Proceedings against the Shareholders.* — In proceedings in equity brought by creditors of a corporation to reach the unpaid capital subscribed by the company's shareholders, it is necessary to consider the equities of the shareholders, as well as the equitable rights of creditors. Each shareholder has an equitable right to insist that every other shareholder shall contribute his ratable share in payment of the company's debts.¹ This equity, however, can be adjusted only in a general proceeding for a distribution of the company's assets, under the supervision of a court of equity. If an ordinary creditors' bill or garnishee proceeding is brought against particular shareholders, the latter cannot set up their equitable right to contribution from the other shareholders as a defence to the whole or a part of the plaintiff's claim. They cannot compel the creditor to adjust the equities between the shareholders. In order to secure an adjustment of their equities, the shareholders must themselves apply for a distribution of all the company's assets.²

A judgment creditor of a corporation, after the return of his execution, is entitled to bring an action, on behalf of himself and all other creditors who may join in the suit, against the corporation and its shareholders in order to obtain an account of the company's assets and debts, and to compel the shareholders to contribute so much of the capital subscribed by them as will be sufficient to satisfy the claims of the plaintiff and other creditors who may come in for payment.³ Such a proceeding may be maintained although the creditors have a statutory right to proceed against the shareholders directly at law.⁴ No previous call or assessment is necessary to establish the liability of the shareholders. The solvent

¹ See *supra*, §§ 814, 815.

² *Supra*, § 864.

³ The corporation should be made a party. See *infra*, § 893.

⁴ *Holmes v. Sherwood*, 3 McCra. 405. A constitutional or statutory provision, that "the stockholders of

all corporations and joint-stock companies shall be liable for the indebtedness of said corporations to the amount of the stock subscribed and unpaid, and no more," merely reaffirms the common law rights of creditors. Such a provision does

shareholders who are within the jurisdiction of the court must contribute to the full extent of their liability, if necessary to satisfy the claims against the company, and must take their chances of securing contribution from the other shareholders afterwards.¹

§ 867. *Receivers of Insolvent Corporations.* — The usual practice is to distribute the assets of an insolvent corporation through a receiver or assignee appointed by the court. The powers and duties of an officer so appointed can be ascertained only by reference to the terms of the order appointing him, and of such statutory provisions as may be applicable. As a rule, however, a receiver, trustee, or assignee, appointed at the suit of a creditor of a corporation, is held to represent both the company and its creditors; and it is his duty, as such representative, to collect all funds to which the creditors are equitably entitled, even though the corporation would be unable to claim them. In many of the States this has been expressly provided by statute.²

not give creditors a right to sue the shareholders at law to recover unpaid capital. *Patterson v. Lynde*, 106 U. S. 519; *Ladd v. Cartwright*, 7 Oreg. 329. See also *Brown v. Fisk*, 23 Fed. Rep. 228.

The provisions of the National Banking Act for winding up national banks are not exclusive of other remedies. A State court may appoint a receiver of a national bank, if prior proceedings have not been begun in the Federal courts. *Wright v. Merchants' Nat. Bank*, 1 Flipp. 568; *Merchants', &c. Nat. Bank v. Masonic Hall*, 63 Ga. 549; *Brinckerhoff v. Bostwick*, 23 Hun, 237.

¹ *Supra*, § 815; *Holmes v. Sherwood*, *supra*; *Hodges v. Silver Hill Mining Co.*, 9 Oreg. 200.

² *Sawyer v. Hoag*, 17 Wall. 619; *Upton v. Tribilcock*, 91 U. S. 45; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112; *Powers v. Hamilton Paper Co.*, 60 Wis. 23; *Stokes*

v. New Jersey Pottery Co., 46 N. J. Law, 287; *Alexander v. Relfe*, 74 Mo. 495; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Nathan v. Whitlock*, 9 Paige, 152; *Whittlesey v. Delaney*, 73 N. Y. 571; *Atty.-Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272; *Dane v. Young*, 61 Me. 160; *National Trust Co. v. Miller*, 33 N. J. Eq. 155, 158; *Eyton v. Denbigh, &c. Ry. Co.*, L. R. 6 Eq. 488.

A receiver cannot, as a general rule, bring a suit out of the State in which he was appointed, until his receivership has been extended by appointment in the State where the suit is to be brought. *Holmes v. Sherwood*, 3 McCra. 405. Compare *Chandler v. Siddle*, 3 Dill. 477; *Glenn v. Williams*, 60 Md. 93. But a court will appoint a receiver to take charge of assets within its jurisdiction, though the corporation be a foreign one, and the creditors applying for a receiver be residents of another State. Na-

§ 868. Powers of Receivers and Assignees in Bankruptcy. —

In a suit brought by a judgment creditor of an insolvent corporation to obtain a distribution of the company's assets, a receiver may be appointed to collect all funds out of which the creditors of the company, or any class of creditors, are entitled to be paid. He may therefore be authorized to collect, not only the assets which the corporation could recover, but also any assets which have been transferred by the corporation subject to the equitable lien of creditors;¹ he may likewise be empowered to compel the shareholders to contribute any capital which they are liable to contribute for the benefit of any class of creditors,² and to recover compensation for any withdrawal or misappropriation of capital in violation of the rights of existing creditors.³

However, the functions of a receiver of a corporation are limited to the collection of the funds out of which the creditors of the corporation, or a class of creditors, are entitled to be paid. A receiver cannot be empowered to sue on behalf of particular creditors, to establish original causes of action which such creditors may have against the corporation or against individuals by whom they have been wronged. Thus, if persons contracting with a corporation have been defrauded by false representations concerning the condition of the company's capital, their claim for damages cannot be enforced on their behalf by a receiver appointed in proceedings to wind up the company.⁴

A receiver or assignee, who has been invested with general authority to collect all funds out of which the creditors of a corporation are entitled to be paid, is always entitled to recover assets which belong to the corporation; but in order to recover funds which the corporation itself could not recover, he must show that he represents creditors who have an equitable right to be paid out of these funds.⁵

tional Trust Co. v. Miller, 83 N. J. 35 La. Ann. 276. The same rule applies to assignees in bankruptcy. Eq. 155. Walker v. Reister, 102 U. S. 467.

¹ *Supra*, § 789 *et seq.*

² *Supra*, § 822.

³ *Supra*, §§ 794, 795.

⁴ Compare Raymond v. Palmer, 415.

⁵ McLean v. Eastman, 21 Hun, 312; Billings v. Robinson, 94 N. Y.

PART III.

RIGHTS OF CREDITORS AGAINST SHAREHOLDERS UNDER
SPECIAL STATUTORY PROVISIONS.

§ 869. **General Character of the Liability of Shareholders under Special Provisions.**—The general rule of the common law is, that the shareholders or members of a corporation are not liable for the debts of the association except to the extent of the capital which they have agreed to contribute for carrying on the company's business. In many instances, however, charters and general incorporation laws expressly provide that the shareholders of the companies formed under them shall be subject to a further individual liability to creditors.

A provision of this character does not increase the capital or pecuniary resources of a corporation, except indirectly, by increasing its commercial credit; its object is merely to provide a security for creditors in addition to the security furnished by the company's capital. The liability thus assumed by the shareholders is solely for the benefit of the company's creditors.¹ The corporation and its officers and agents cannot dispose of or control it in any manner. They cannot collect it by an assessment upon the shareholders;² nor can they assign it to a trustee for the benefit of creditors, though the corporation be insolvent.³

A receiver invested with "all the estate, property, and equitable interests" of an insolvent corporation would have no power to enforce the individual statutory liability of the shareholders to creditors; nor would the appointment of such receiver affect the rights of creditors to enforce this liability by proceedings against the shareholders directly.⁴

¹ *Bristol v. Sanford*, 12 Blatchf. 113; *Liberty Female College Ass. v. Watkins*, 70 Mo. 13. 341; *Dutcher v. Marine Nat. Bank*, Id. 435; *Lane v. Morris*, 8 Ga. 468; and see the following sections.

² *Wright v. McCormack*, 17 Ohio St. 86, 95.

³ *Umsted v. Buskirk*, 17 Ohio St.

⁴ *Farnsworth v. Wood*, 91 N. Y.

§ 870. *How the Liability arises.* — A provision in the charter or general law under which a corporation was formed, declaring that its shareholders shall be individually liable to creditors, does not of itself, by force of the legislative act, render them individually liable. It is merely a legislative enactment that any person who shall become a shareholder in the corporation, or, in other words, enter into the contract of membership, shall at the same time assume an individual liability to the creditors of the company. The function of the legislature in creating this liability is merely to declare the legal effect of the voluntary acts of the parties, and to enable them to carry out their purposes in a manner which would not have been authorized at common law. When a person becomes a shareholder in a corporation, he agrees with all the other shareholders to unite with them upon the terms provided by the company's charter; he also undertakes to become liable to any person who shall give credit to the corporation, to the extent of the capital which he has agreed to contribute.¹

If the company's charter provides that the shareholders shall be subject to a special individual liability to creditors, persons becoming shareholders agree to become liable, both in a corporate capacity and individually, to all persons who shall give credit to the corporation. They offer to all the world to become liable, in their corporate capacity, to the extent of the capital which they have agreed to contribute for the purpose of carrying on the company's business, and they offer to become liable individually to the amount expressly provided by their charter or incorporation law. Parties who contract with the corporation contract upon the faith of this liability, held out as their security; and the offer

308; *Jacobson v. Allen*, 20 Blatchf. 525; *Arenz v. Weir*, 89 Ill. 25; *Bristol v. Sanford*, 12 Blatchf. 341; *Dutcher v. Marine Nat. Bank*, Id. 435.

¹ *Supra*, § 818. A constitutional provision that each stockholder in a corporation thereafter organized

"shall be liable to the amount of the stock held or owned by him," does not prohibit the legislature from requiring the shareholders in companies formed thereafter to assume an additional liability. *Allen v. Walsh*, 25 Minn. 543.

of the shareholders, being thereby accepted, ripens into a binding contract.¹

§ 871. **Contracts into which the Liability of Shareholders does not enter.**—However, a statutory provision declaring that the shareholders in a corporation shall be individually liable to creditors would not prevent the execution of contracts into which this liability does not enter. If a person contracting with the corporation should expressly agree to accept the obligation of the corporation without the special liability of its shareholders, he would not be able to charge the latter.² Such a provision is solely for the benefit of those dealing with the corporation, and may be waived by them. And even if the legislature intended that the liability should extend to all the corporate debts without exception, the shareholders could not be charged with liability upon a contract whose express terms provide that shareholders shall not be liable. The contract would either be binding as agreed upon by the parties, or it would be legally unenforceable.³

§ 872. **It is a contract Liability within the Meaning of Statutes.**—The nature and extent of the special individual liability of the shareholders of a corporation necessarily depend upon the particular provisions of the charter or general law

¹ See *Terry v. Calnan*, 18 S. Car. 220, 227; *Sullivan v. Sullivan Manuf. Co.*, 14 S. Car. 494, 500; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *Manville v. Edgar*, 8 Mo. App. 824; *Wiles v. Suydam*, 64 N. Y. 178; *Corning v. McCullough*, 1 Comst. 47, 55; *Moss v. McCullough*, 5 Hill, 188, *per* Cowen, J.; *McMahon v. Macy*, 51 N. Y. 155, *per* Gray, C. And see the following sections. Compare *Green v. Beckman*, 59 Cal. 545; *Terry v. Little*, 101 U. S. 217; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. Law, 52.

A similar result has been reached without the creation of what is technically called a corporation, under the English Joint-Stock Com-

pany Acts. *Oakes v. Turquand*, L. R. 2 H. L. 325.

² *Brown v. Eastern Slate Co.*, 184 Mass. 590. In this case the plaintiff accepted promissory notes of the corporation in payment of property sold to the company under a written contract. At the same time, he orally agreed with the directors that the shareholder should incur no personal liability for the claim. The court held that the oral agreement was binding. See to the same effect *Basshor v. Forbes*, 36 Md. 154; *French v. Teschemaker*, 24 Cal. 518; *Robinson v. Bidwell*, 22 Cal. 379, 388. See also *supra*, § 829.

³ Compare *supra*, § 748.

under which the parties have created it. It has been pointed out, that this liability is, *in reality*, the result of an agreement or contractual relation formed between the shareholders and creditors of the corporation. Whether this agreement be called a contract or not, is merely a matter of definition. It may not be a contract according to the technical rules of the common law; but it contains every essential element of a contract, and it is legally binding by virtue of statutory enactment. Clearly, then, it should be regarded as a contract within the broad scope and meaning of the prohibition of the Constitution of the United States against State laws impairing the obligation of contracts.

Accordingly, it was held by the Supreme Court of the United States, that a State law repealing a provision in the charter of a corporation, which made its shareholders individually liable to creditors, was unconstitutional and void with respect to existing creditors. Justice Nelson, delivering the opinion of the court, said: "It is quite clear that the personal liability clause in the charter, in the present case, pledges the liability or guaranty of the shareholders, to the extent of their stock, to the creditors of the company, and to which pledge or guaranty the shareholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability."¹

§ 878. In *Corning v. McCullough*, the Supreme Court of New York decided that an action to charge a shareholder

¹ *Hawthorne v. Calef*, 2 Wall. 10, 22; *Conant v. Van Schaick*, 24 Barb. 87; *Provident Savings Inst. v. Jackson Place, & Co. Rink*, 52 Mo. 552; *St. Louis Ry. Supplies, & Co. v. Harbine*, 2 Mo. App. 134; *Blakeman v. Benton*, 9 Mo. App. 107. Compare *Vick v. La Rochelle*, 57 Miss. 602.

However, the individual liability clause may be repealed as to future creditors, or as to shareholders becoming members of the company

by an issue of new shares. *Nassau Bank v. Brown*, 80 N. J. Eq. 478. And see *supra*, §§ 815, 816.

The special liability cannot be imposed upon the shareholders by retroactive law. *Fairchild v. Masonic Hall Ass.*, 71 Mo. 526.

But if a corporation increases its capital under a general law imposing the liability, the subscribers for the new shares will be liable. *Tibbals v. Libby*, 87 Ill. 142.

with individual liability for debts of the corporation was not "an action upon a statute for a forfeiture or cause," within the meaning of the three years' statute of limitations applicable to actions of that class. The court held that the individual liability of a shareholder was founded upon contract, and that an action to enforce this liability could therefore be brought at any time within six years.¹

In *Carrol v. Green*,² the Supreme Court of the United States decided that a suit brought to enforce the special individual liability of the shareholders of a corporation was barred by a statute of limitations providing that "actions of debt upon any lending or contract, without specialty," should be brought within four years. It was argued that the liability was created by statute, and therefore a debt by specialty. But the court held that the shareholders were liable by reason of their voluntary agreement to the terms of their charter of incorporation.

Again, in *Norris v. Wrenschall*,³ it was held that an act enabling a plaintiff to facilitate the recovery of judgment by filing an affidavit with his declaration, in "every suit where the cause of action is a contract, whether in writing or not, or whether express or implied," was applicable to a suit brought to enforce the individual liability of a shareholder.

§ 874. *Liability of Shareholders in Foreign Corporations.*—The contract of a shareholder is measured by the charter or constating instruments of the company of which he agrees to become a member. When a person agrees to become a shareholder in a corporation chartered by a foreign State, he must necessarily be held to contract with reference to all laws of that State which enter into the constitution of the company; and if the charter or incorporating act of the company provides that its shareholders shall be individually liable to creditors, he will become individually liable to the

¹ *Corning v. McCullough*, 1 N. Y. 47. See also *Story v. Furman*, 25 N. Y. 215; *Terry v. Calnan*, 13 S. Car. 220, 227. Compare *Lawler v. Burt*, 7 Ohio St. 340.

² *Carrol v. Green*, 92 U. S. 509.

Compare *Bullard v. Bell*, 1 Mason, 243.

³ *Norris v. Wrenschall*, 34 Md. 492.

same extent as any other member, not because he is bound by the laws of the State where the company was incorporated, but because he has voluntarily agreed to the terms of the company's constitution.¹ On the other hand, if the constitution to which a corporator has agreed does *not* provide for individual liability to creditors, he cannot be charged with individual liability anywhere. A State would have no power to impose a liability upon the shareholders of a foreign corporation unless they are within the jurisdiction of the State. And it will not be presumed that the legislature intended that a general law imposing a liability upon shareholders should apply to the shareholders in foreign corporations, even though they be within the jurisdiction of the State, unless the will of the legislature has been clearly expressed.²

§ 875. *Suits against Shareholders in Foreign Corporations.* — It seems clear, upon principle, that a creditor of a corporation whose shareholders are individually liable for its debts may maintain a suit to enforce this liability wherever he can obtain jurisdiction over the necessary parties.³ The right to maintain a suit of this character outside of the jurisdiction of the State by which the corporation was chartered does not depend upon the comity of the State where the suit is brought, or its willingness to recognize and give effect to the laws of a foreign State; it depends upon the willingness of the courts to enforce a contract validly entered into between the parties in another jurisdiction. A refusal to grant a remedy in a case of this kind would not be a refusal to enforce a foreign law; it would be simply a denial of justice.

¹ *Payson v. Withers*, 5 Biss. 269, *Ex parte Van Riper*, 20 Wend. 614; 278; *Hodgson v. Cheever*, 8 Mo. App. 318; *Hodgson v. Cheever*, 8 Mo. App. 318; *Lowry v. Inman*, 46 N. Y. 119;

² Compare *Merrick v. Van Santvoord*, 84 N. Y. 208; *Seymour v. Sturgeess*, 26 N. Y. 134; *McDonough v. Phelps*, 15 How. Pr. 872. And see *infra*, Chapter XIII.

³ *Aultman's Appeal*, 98 Pa. St. 505; *Flash v. Conn*, 109 U. S. 371; 517; *Cuykendall v. Miles*, 10 Fed. Rep. 342; *Hutchins v. New England Coal Mining Co.*, 4 Allen, 580; *Bond v. Appleton*, 8 Mass. 472; *Sackett's Harbour Bank v. Blake*, 8 Rich. Eq. 225; *Paine v. Stewart*, 83 Conn. 517.

§ 876. However, the remedy provided by law for the enforcement of a contract does not enter into the contract itself; it is purely a matter of municipal regulation, and may therefore be altered at any time without impairing any rights of the contracting parties.¹ This rule applies with full force to the individual liability of shareholders in a corporation. The individual liability of shareholders results from their voluntary agreement under the statute; but if the charter or general law providing this liability at the same time provides a particular remedy for enforcing it, the remedy provided by the statute does not enter into the agreement; it results entirely from the legislative enactment. For this reason it follows that the individual liability of shareholders can be enforced in a foreign State only by the remedies provided by the laws of that State; legislative provisions providing particular remedies for enforcing this liability have no extra-territorial force. And even though the contracting parties intend to make a provision of this character a part of their contract, they cannot, by their agreement, alter the established practice of the courts.

Upon this principle, it was held in Massachusetts, that the provisions of the laws of New York authorizing joint-stock companies to sue and be sued in the first instance in the name of their managing officers would not be given effect in Massachusetts, and that the member of a joint-stock company formed in New York, being partners in fact, were suable in Massachusetts as partners.²

§ 877. **The Liability of Shareholders is not a Statutory Penalty.** — It has sometimes been held that, if the shareholders in a corporation are made individually liable for the corporate debts in case they fail to comply with certain conditions prescribed by law, the liability so imposed is a statutory penalty, and cannot be enforced outside of the State by whose laws it

¹ *Hodgson v. Cheever*, 8 Mo. App. 318; *Drinkwater v. Portland Marine Ry. Co.*, 18 Me. 35; *Taft v. Ward*, 106 Mass. 518. And see *Erickson v. Nesmith*, *infra*, § 904.

² See *Taft v. Ward*, 106 Mass. 518; *Gott v. Dinsmore*, 111 Mass. 45; *Boston, &c. R. R. Co. v. Pearson*, 128 Mass. 445. On this subject see *infra*, § 989.

was imposed.¹ This doctrine can be supported only on the theory that the statutory provision imposing the liability is in the nature of a police regulation, and that it was not imposed by the legislature for the benefit of those dealing with the company, and does not enter into the obligations which the company assumes.² If the liability was imposed by the legislature for the benefit of those dealing with the company, and does enter into the corporate obligations, the mere fact that it is in the nature of a penalty would not be a ground for refusing to enforce it in a foreign State, any more than it would be a reason for refusing to enforce a forfeiture or a penal bond. Indeed, there seems to be no good reason why the liability of shareholders in a corporation for debts of the association should not be regarded in every instance like any other just obligation between parties, and enforced wherever jurisdiction of the parties can be obtained. The shareholders in a corporation constitute the association, and the corporate obligations are really incurred on their behalf. A statute providing that the shareholders shall be individually liable for obligations incurred on their behalf, can hardly be deemed a penal law, even though the liability be imposed for a non-performance of specified conditions. It would simply be a law adjusting the rights and obligations of the creditors and shareholders. It is not necessary that the liability of the shareholders should be the result of a contract, in order to be enforceable in another State. The general rule is that the courts will enforce any obligation incurred in another State, whether it be the result of a contract, or of a tort, or of the violation of a statutory right; the exception to the rule is that the courts will not enforce a statutory obligation imposed by a foreign State for the purpose of enforcing a rule of pub-

¹ It has been held that such a liability is a "statutory penalty" within the meaning of statutes of limitation. *Gridley v. Barnes*, 108 Ill. 211. And that it does not survive the death of a shareholder. *Diversey v. Smith*, 108 Ill. 378. See also *Cable v. McCune*, 26 Mo. 380; *Lawler v. Burt*, 7 Ohio St. 340; *Cady v. Smith*, 12 Neb. 628, 630.

² The State might repeal such a law at any time without impairing the constitutional rights of existing creditors. Compare *Gregory v. German Bank of Denver*, 8 Col. 332.

lic policy, and not for the purpose of adjusting the private rights of individuals.

It seems reasonable, therefore, to draw a distinction between the liability, which is sometimes imposed upon the directors of a corporation, for a failure to perform certain duties prescribed by law, and the liability imposed upon the shareholders. The directors are merely the agents of the corporation, and are not in a contractual relation to the company's creditors. They are liable at common law and in equity to make just compensation for any wrong done to creditors by an invasion of their legal or equitable rights. Any additional liability imposed by statute is a penalty, and not compensation awarded to adjust the private rights of parties.¹

§ 878. *Liability of Shareholders compared with that of Partners.* — Statements frequently occur in the books, that the liability of the shareholders in a corporation, under a particular statutory provision imposing a special individual liability to creditors, is that of *partners*, to the extent indicated by the legislature.² The meaning of these statements is not always clear.

Whether or not shareholders are partners depends upon the meaning of the word "partners." Shareholders in a corporation are undoubtedly partners within a broad meaning of the term, and this is true whether they are subject to a special individual liability to creditors or not.³ But it is equally a fact, that they are not partners within the narrow meaning of the term "partners" under the common law. The very object of an act of incorporation is to enable the shareholders

¹ See *infra*, § 906 *et seq.*

In *Wiles v. Suydam*, 64 N. Y. 173, it was held that a person who was both shareholder and director of a corporation organized in New York, under the act of 1848, chap. 40, could not be sued in the same action for his individual liability as shareholder under section 10 of the act, and his liability as director

under section 12; the former cause of action being upon contract, the latter upon a statute for a penalty or forfeiture.

² See *Thompson v. Meisser*, 108 Ill. 359; *Buchanan v. Meisser*, 105 Ill. 688; *Marshall v. Harris*, 55 Iowa, 182.

³ See *supra*, §§ 1, 7.

to form an association which is *not* a common law partnership, and is *not* subject to the technical rules of the common law. The fact that the shareholders in a corporation are subject to an individual liability to creditors would merely constitute one point of resemblance between the association and a common law partnership, but it would not render the association a common law partnership, nor would it make the shareholders common law partners. To reason that, *because* the liability of the shareholders under the statute resembles the liability of partners under the common law, therefore it must be governed by the technical rules of the common law applicable to the liability of partners, indicates a confusion of ideas.¹ The special individual liability of shareholders depends upon statutory enactment and the agreement of the shareholders, and its character and extent can be ascertained only by construction of the charter or law under which it is created.

§ 879. *Shareholders are not Sureties or Guarantors of the Corporation.* — It has sometimes been said that the individual liability assumed by the shareholders of a corporation for the security of creditors is that of guarantors or sureties of the corporation.² Statements of this character must always be considered with reference to the particular subject matter to which they are applied. It is a truth which no legislative act or judicial decision can alter, that a corporation consists of its shareholders, and that, when shareholders become individually liable for debts of their corporation, they become individually liable for debts which they themselves owe in a corporate capacity. This individual liability may be in some respects similar to that of suretyship, but it is certain that the shareholders are not in fact sureties, within the accepted meaning of that term.³ To hold that, *because* shareholders

¹ See, for example, *Thompson v. Meisser*, 108 Ill. 359.

² *Moss v. Averell*, 10 N. Y. 459; *Belmont v. Coleman*, 21 N. Y. 96. See, however, *Craig's Appeal*, 92 Pa. St. 396; *Sonoma Valley Bank v. Hill*, 59 Cal. 107.

³ Where shareholders are liable

after a transfer of their shares, the liability is in equity similar to that of a surety after a transfer, the transferee becoming the principal obligor as between himself and the prior holder of the shares. *Wheeler v. Faurot*, 37 Ohio St. 26. *Infra*,

§ 888 *et seq.*

are called sureties within a special meaning of that term, their liability must be governed by the principles of *ordinary* suretyship, would plainly be illogical.

In *Hanson v. Donkersley*,¹ the Supreme Court of Michigan held that the liability of shareholders, under a statute rendering them individually liable for labor performed for the corporation, was that of sureties; and that for this reason they were discharged from liability for the claims of a laborer who had given time to the corporation by accepting a promissory note payable at a future day. If the court had borne in mind that the indulgence given to the corporation was in fact given to the shareholders themselves, acting in a corporate capacity through agents of their own appointment, a different conclusion would probably have been reached.

§ 880. *Construction of Provisions imposing Individual Liability.*—In construing a statutory provision imposing individual liability upon the members of a corporation, it is the duty of the courts to ascertain and carry out the intention of the legislature. To lay down any arbitrary rule for the construction of a particular class of statutes is manifestly contrary to reason, and can only lead to error and perversion of justice.² Accordingly, it was held by Justice Story, in *Carver v. Braintree Manufacturing Company*,³ that the words “debts contracted,” in a statute imposing individual liability upon the shareholders of a corporation for all debts contracted during their membership in the company, were intended to embrace all liabilities incurred by the company, either *ex contractu* or *ex delicto*, and therefore included a claim for unliquidated damages on account of an infringement of a patent. However, the generally accepted doctrine seems to be that the word “debts,” in a statute of this character, refers only to obligations incurred by the corporation

¹ *Hanson v. Donkersley*, 37 Mich. 184. Compare *Gray v. Coffin*, 9 Cush. 199; *Dane v. Dane Manuf. Co.*, 141 Mass. 557. Compare *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557.

² *Carver v. Braintree Manuf. Co.*, 2 Story, 447-451; *Bohn v. Brown*, 33 Mich. 257; *Lane v. Morris*, 8 Ga. 475; *Ingalls v. Cole*, 47 Me. 540.

³ 2 Story, 432, 447.

ex contractu, and not to liabilities for torts committed by the company's agents.¹

The debts for which the shareholders are liable by statute undoubtedly include interest accrued against the corporation.

Where the liability of the shareholders is limited by the statute to a certain amount, as, for example, to double the amount of their shares, they may be charged to that amount, together with interest thereon from the commencement of the suit or from the time when their liability matured.²

§ 881. *Extent of the special Individual Liability.*—It would be a departure from the plan of this treatise to examine in detail all the different statutory provisions by which individual liability has been imposed upon the members of incorporated companies. The nature and extent of the liability imposed vary greatly in different States and under different charters and general laws, and it is often impossible to reconcile the conclusions reached by different courts in the construction of provisions apparently similar in terms.

Sometimes the liability imposed is a general one for all the company's debts. Under a provision of this character, the incorporators have been held liable to creditors as partners, or members of a simple joint-stock company.³ In many cases,

¹ See *Mill Dam Foundry Co. v. Weiss v. Mauch Chunk Iron Co.*, Hovey, 21 Pick 417, 455; *Child v. 68 Pa. St. 295*; *Reading Industrial Boston, &c. Iron Works*, 137 Mass. 516; *Doolittle v. Marsh*, 11 Neb. 243; *Dryden v. Kellogg*, 2 Mo. App. 93; and compare *Cable v. McCune*, 26 Mo. 371; *Heacock v. Sherman*, 14 Wend. 58; *Archer v. Rose*, 3 Brewster, 284; *Bohn v. Brown*, 33 Mich. 257.

As to when a debt is deemed to have been contracted, see *Garrison v. Howe*, 17 N. Y. 464, 466; *Byers v. Franklin Coal Co.*, 106 Mass. 131.

In some cases the shareholders have been made individually liable for certain classes of debts only, as for debts incurred by the corporation for labor and supplies. See

² See *Casey v. Galli*, 94 U. S. 673; *Handy v. Draper*, 89 N. Y. 334; *Burr v. Wilcox*, 22 N. Y. 551. Compare *Munger v. Jacobson*, 99 Ill. 349; *Cole v. Butler*, 43 Me. 401; *Sackett's Harbour Bank v. Blake*, 3 Rich. Eq. 225.

³ See *Planters' Bank v. Bivingsville, &c. Manuf. Co.*, 10 Rich. L. 95; *Southmayd v. Russ*, 3 Conn. 52; *Middletown Bank v. Magill*, 5 Conn. 28; *Deming v. Bull*, 10 Conn. 409; *Corning v. McCullough*, 1 Comst. 47; *Conant v. Van Schaick*, 24

however, only a limited liability is provided. Thus, the shareholders of some corporations are declared individually liable to creditors "to double the amount of the stock held by them," or "to an amount equal to the amount of the stock held by them." Under provisions of this character each shareholder is individually liable to the extent of the par value of his shares, after the shares have been fully paid up.¹ In other cases each shareholder is rendered liable to the creditors of the corporation "ratably," or for "such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole capital stock."²

§ 882. *Liability of Shareholders in National Banks.* — The Act of Congress of 1864 provides that the shareholders in a national bank shall be "individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." When a national bank is insolvent, the extent to which the individual liability of the shareholders shall be enforced is fixed by the order of the Comptroller of the Currency, and such order is conclusive upon the shareholders. If the order is to collect an amount equal to the full par value of the shares, the receiver of the bank must sue each shareholder at law for the amount, together with interest from the date of the order.³

The method of adjusting the liability of the shareholders

Barb. 87; *Allen v. Sewall*, 2 Wend. 327; *Moss v. Averell*, 10 N. Y. 459; *Erickson v. Nesmith*, 46 N. H. 371; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646. Compare *New England Commercial Bank v. Newport, &c. Factory Co.*, 6 R. I. 154. *Lewis v. St. Charles County*, 5 Mo. App. 225. ² *Larrabee v. Baldwin*, 35 Cal. 155, 178; *Morrow v. Superior Court*, 64 Cal. 383; *Adkins v. Thornton*, 19 Ga. 325; *Branch v. Baker*, 53 Ga. 512; *Dane v. Young*, 61 Me. 160; *Castleman v. Holmes*, 4 J. J. Marsh. 1.

¹ *Perry v. Turner*, 55 Mo. 418; *Booth v. Campbell*, 37 Md. 522; *Norris v. Johnson*, 34 Md. 485; *Matthews v. Albert*, 24 Md. 527. Compare *Schricker v. Ridings*, 65 Mo. 208; *Gay v. Keys*, 30 Ill. 418; *Compare Lane v. Harris*, 16 Ga. 217; *Crease v. Babcock*, 10 Mete. (Mass.) 557.

³ See *Casey v. Galli*, 94 U. S. 673; *Kennedy v. Gibson*, 8 Wall. 498; *Bailey v. Sawyer*, 4 Dill. 463.

was pointed out by the Supreme Court of the United States as follows: "In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain, — 1. the whole amount of the par value of all the stock held by *all the shareholders*; 2. the amount of the deficit to be paid after exhausting all the assets of the bank; 3. then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock. The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the individual liability of the other stockholders is computed accordingly."¹

§ 883. *Conditions Precedent. — Proceedings against the Corporation.* — The special individual liability of the members of a corporation is not intended to be the primary source for the payment of the corporate debts. The fund subscribed by the shareholders at the formation of their company is expected to be the company's sole working capital, and the means of satisfying its creditors; any additional individual liability assumed by the corporators is intended merely as a secondary security for creditors, in case the capital supplied for carrying on the company's business should be lost in speculation. For this reason, it is a condition in nearly all provisions imposing individual liability upon the shareholders of incorporated companies, that creditors must first exhaust their remedies against the corporation and its assets, by obtaining judgment and issuing execution, before they can

¹ *United States v. Knox*, 102 U. S. 422, 425, *per* Mr. Justice Swayne. Compare *Crease v. Babcock*, 10 Metc. (Mass.) 525; *Atwood v. R. I. Agricultural Bank*, 1 R. I. 376; *Re Hollister Bank*, 27 N. Y. 393; *Adkins v. Thornton*, 19 Ga. 325; *Robinson v. Lane*, Id. 337; *Wiswell v. Starr*, 48 Me. 401.

proceed against the shareholders individually. As a rule, this is expressly provided for by the statute or charter under which the liability is created; but even where there is no express provision to that effect, it may fairly be implied from the character of the liability and the intention of the parties.¹

However, proceedings against the corporation are not required as a condition precedent to the right to charge its shareholders individually, where they would be impossible or nugatory. Hence, if the corporation has been dissolved or thrown into bankruptcy,² or placed in the hands of a receiver,³ judgment and execution against the company are not necessary before proceeding against the shareholders individually.

§ 884. It should be observed, also, that a single judgment creditor, whose execution has been returned unsatisfied, may usually file a bill in equity for the purpose of enforcing the individual liability of the shareholders on behalf of *all* the company's creditors. In such a proceeding the proceeds of the liability of all the shareholders are regarded as

¹ *McClaren v. Franciscus*, 43 Mo. 452; *Wright v. McCormack*, 17 Ohio St. 95; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. 230; *Bush v. Cartwright*, 7 Oreg. 329; *Lane v. Harris*, 16 Ga. 217; *Drinkwater v. Portland Marine Ry. Co.*, 18 Me. 35; *Dauchy v. Brown*, 24 Vt. 197; *Cambridge Water-Works v. Somerville Dyeing, &c. Co.*, 4 Allen, 239. See *Toucey v. Bowen*, 1 Biss. 81; *Handy v. Draper*, 89 N. Y. 334, reversing 23 Hun, 256. Compare *Patterson v. Wyomissing Manuf. Co.*, 40 Pa. St. 117; *Means's Appeal*, 85 Pa. St. 75; *Southmayd v. Russ*, 3 Conn. 52; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Harper v. Union Manuf. Co.*, 100 Ill. 225; *Perkins v. Church*, 31 Barb. 84. See, however, *Manufacturing Co. v. Bradley*, 105 U. S. 175.

It has been held that, if the statute requires a judgment and execution against the corporation before the shareholders can be charged with the special individual liability, a judgment and execution in the State where the corporation was formed are necessary. *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338; *Viele v. Wells*, 9 Abb. N. C. 277; *Dean v. Mace*, 19 Hun, 391.

² See *Shellington v. Howland*, 53 N. Y. 371; 67 Barb. 14; *Flash v. Conn*, 109 U. S. 371; *State Savings Ass. v. Kellogg*, 52 Mo. 583; *Dryden v. Kellogg*, 2 Mo. App. 87; *Chamberlin v. Huguenot Manuf. Co.*, 118 Mass. 532. Compare *Birmingham Nat. Bank v. Mosser*, 14 Hun, 605.

³ *Paine v. Stewart*, 33 Conn. 516, 531; and see *infra*, § 903.

a fund to be distributed ratably among all the creditors. Every creditor is entitled to come in and share in the distribution, whether he has previously obtained a judgment or not. Those creditors whose claims against the corporation are disputed may establish their claim before a master in chancery or referee, or in such other way as the court may direct.¹

§ 885. *Other Conditions.*—Where the statute or charter imposing individual liability upon the shareholders in a corporation prescribes certain acts to be performed by creditors before proceeding against the shareholders individually, the performance of these acts is a condition precedent to their liability. Thus, under some statutes, creditors must bring suit against the corporation within a limited period of time; before proceeding against the shareholders individually;² in other cases, a special demand upon the officers of the corporation is required.³

A general incorporation law of New York declared that “for all debts of the company at the time of its dissolution the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company, and no further.” It was held by the Court of Errors of New York, overruling the decision of Chancellor Kent, that a corporation must be deemed dissolved, within the meaning of this act, whenever it has suffered any acts to be done which destroy the end and object for which the company was formed.⁴

The charter of a bank provided that, “in case of the failure of the said bank, each shareholder having stock at the time, or any time within twelve months, shall be individually liable to twice the amount of his stock.” It was held that “the failure” of the bank, within the meaning of this provision, took place when it suspended specie payments, and that the statute of limitations began to run from that time.⁵

¹ See *infra*, § 897.

² See *Haynes v. Brown*, 36 N. H.

³ See *Shellington v. Howland*, 58

545.

N. Y. 371; *Birmingham Nat. Bank v. Mosser*, 14 Hun, 605; *State Savings Ass. v. Kellogg*, 52 Mo. 583.

⁴ *Infra*, § 1012.

⁵ *Godfrey v. Terry*, 97 U. S. 171; *Terry v. Calnan*, 18 S. Car. 220.

§ 886. **Effect of Judgment against the Corporation.** — It has been questioned whether a judgment obtained by a creditor against a corporation be conclusive in a suit to charge the members of the company individually, so as to dispense with any further proof of the plaintiff's claim. A judgment obtained against the corporation is certainly conclusive, until reversed for error or impeached for fraud, in a suit to charge the shareholders upon their unpaid stock subscriptions; and by analogy it should also be held conclusive in a suit to charge them upon their additional individual liability to creditors.¹ It must be borne in mind that a corporation is composed of its shareholders, and that a judgment obtained against the corporation is in reality a judgment obtained against the shareholders in their corporate capacity. There is no reason why the members of a corporation should be allowed to contest a creditor's claim twice, — once in the suit against the corporation through the corporate agents, and again in the suit brought to charge them individually. If the judgment against the corporation was obtained by fraud, or through collusion with the company's agents, the shareholders may obtain relief through equitable proceedings.

Where the shareholders are individually liable only for certain classes of debts incurred by the company, it is clear that

¹ *Donworth v. Coolbaugh*, 5 Iowa, 300; *Milliken v. Whitehouse*, 49 Me. 527; *Came v. Brigham*, 39 Me. 35; *Slee v. Bloom*, 20 Johns. 669; *Gas-kill v. Dudley*, 6 Metc. (Mass.) 546; *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385; *Thayer v. New England, &c. Printing Co.*, 108 Mass. 523; *Holyoke Bank v. Goodman Paper Co.*, 9 Cush. 576; *Bank of Australasia v. Nias*, 20 L. J. Q. B. 284; and see note in 15 Fed. Rep. 863. See also *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363; and compare *Union Bank v. Wando Mining, &c. Co.*, 17 S. Car. 339.

The same doctrine has been applied where the judgment against

the corporation may be enforced against the stockholders directly. See *Hampson v. Weare*, 4 Iowa, 13; *Wilson v. Pittsburgh, &c. Coal Co.*, 43 Pa. St. 424. Compare *Came v. Brigham*, 39 Me. 35; *Merrill v. Suffolk Bank*, 31 Me. 57.

In some instances the judgment has been held to be only *prima facie* evidence of the plaintiff's claim in an action to charge the stockholders individually. *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557; *Merchants' Bank v. Chandler*, 19 Wis. 435; *Grund v. Tucker*, 5 Kans. 70; *Berger v. Williams*, 4 Mo-Lean, 577.

they cannot be charged upon a judgment obtained against the company, without proof of the character of the claim for which the judgment against the company was obtained.¹

§ 887. A different view has been taken in New York, in the construction of a statute of that State. It was considered that the shareholders contracting under this statute became liable individually, as guarantors of all debts contracted by the company, provided, however, that the creditor should first, in the manner prescribed by the statute, show the inability of the company to pay the judgment and execution obtained against it. According to this view, the recovery of a judgment against the corporation would not establish the plaintiff's claim as against the individual corporators, nor would it be even *prima facie* evidence of a right to recover.² Suit against a shareholder must be brought upon the original claim of the creditor,³ and the recovery of judgment must be proven as a condition precedent to the defendant's liability.⁴

§ 888. **Effect of a Transfer of Shares on the Liability of the Holder.**—The statutory provisions by which individual liability to creditors is imposed upon the shareholders in incorporated companies generally apply in terms to the "shareholders," or "stockholders," or "members" of the companies. In determining who is a shareholder, or stockholder, or member, within the meaning of a provision of this description, the same principles and the same rules apply as in determin-

¹ Bohn v. Brown, 83 Mich. 257; Wilson v. Pittsburgh, &c. Coal Co., 43 Pa. St. 424; Conant v. Van Schaick, 24 Barb. 87. See also Larrabee v. Baldwin, 35 Cal. 155.

² Moss v. McCullough, 5 Hill, 181. See also Conant v. Van Schaick, 24 Barb. 87; McMahon v. Macy, 51 N. Y. 155; Miller v. White, 50 N. Y. 137. See also Trippe v. Huncheon, 82 Ind. 307; Southmayd v. Russ, 3 Conn. 52. Compare Belmont v. Coleman, 21 N. Y. 96; 1 Bosw. 188.

In Grund v. Tucker, 5 Kans. 70, it was held that judgment against the corporation was *prima facie* evidence of plaintiff's claim in a suit to charge the shareholders individually.

In Neilson v. Crawford, 52 Cal. 249, it was held that the books of a company were not admissible against a shareholder to prove the indebtedness of the company in a suit to charge him individually.

³ Bailey v. Bancker, 3 Hill, 188.

⁴ Strong v. Wheaton, 38 Barb. 616; Wheeler v. Miller, 24 Hun, 541.

ing who is liable to creditors to contribute, as a shareholder, to the capital of the company.¹

The question has often been raised, whether a transfer of shares in a corporation operates as a novation of the individual liability of the transferor in respect of existing debts, by discharging him from liability and rendering the transferee liable in his place. The answer to this question depends upon the terms of the legislative provision under which the liability is created. If the expressed will of the legislature is that each creditor shall be entitled to look for payment to those particular persons who are shareholders at the creation of the indebtedness, the courts are bound to hold the transferors of shares liable, like the outgoing partners of a firm. But there are strong arguments against the adoption of this rule where the legislature has not expressly so provided.

One of the distinguishing features of a business corporation is the transferability of its shares; and the object of making shares transferable is to enable parties to deal in them freely. As between a vendor and purchaser of shares, it is always implied that the purchaser shall assume all the rights and obligations attaching to the shares. This is true, even in those cases where a transferor of shares, by express statutory provision, continues liable to those creditors whose claims attached before the transfer; the purchaser of the shares would by implication assume an obligation to see these debts paid, and would be liable to indemnify the vendor against loss.² It would be practically impossible to deal with shares in incorporated companies on any other plan.

The right given by law to transfer shares in a corporation is held to include, by implication, a right to effect a complete novation of the contract of the holder with the other shareholders. The transferor is discharged from all liability to contribute to the company's capital, either for the benefit of the corporation, or for the benefit of creditors,³ and the transferee is rendered liable in his place. There is no reason

¹ *Supra*, § 844 *et seq.* Wakefield
v. Fargo, 90 N. Y. 213.

² *Supra*, § 159.

³ *Supra*, § 858.

why the right of transfer should not likewise be held to include a right to effect a novation of a special individual liability imposed upon the shareholders for the security of creditors alone.¹

If it were held that each creditor of the corporation may pursue those particular persons who happened to be shareholders when the indebtedness arose, whether he has continued to be a shareholder or not, it would often become a matter of extreme difficulty, amounting to a practical impossibility, to adjust the rights of the past and present shareholders;² and there would be no object to be gained by adopting such a rule. The substantial rights of creditors are protected by the rule which invalidates a transfer as to creditors, unless a solvent transferee is substituted in place of the transferor;³ moreover, it cannot fairly be claimed that a person dealing with a corporation organized on the usual plan in the United States deals on the faith of the security offered by the individuals who happen to be shareholders at the time.

§ 889. However, the decisions of the courts upon this question have been exceedingly conflicting,⁴ and it would

¹ In accordance with this view, see *Skrainka v. Allen*, 76 Mo. 384; *Middletown Bank v. Magill*, 5 Conn. 28; *Cleveland v. Burnham*, 55 Wis. 598; *Veiller v. Brown*, 18 Hun, 571; *McClaren v. Franciscus*, 43 Mo. 452; *Longley v. Little*, 26 Me. 162; *Bond v. Appleton*, 8 Mass. 472; *Marcy v. Clark*, 17 Mass. 330; *Curtis v. Harlow*, 12 Metc. (Mass. 3; *Nixon v. Green*, 11 Exch. 550; 3 H. & N. 686.

² The difficulty would be in a great measure obviated by making the present shareholders primarily liable to creditors, and calling upon the past members only in case of a deficiency, as under the English Companies Acts. See *supra*, § 859. Compare *Wheeler v. Faurot*, 37 Ohio St. 28.

³ *Supra*, § 858.

⁴ *Chesley v. Pierce*, 32 N. H. 388; *Moss v. Oakley*, 2 Hill, 265; *Judson v. Rossie Galena Co.*, 9 Paige, 598; *McCullough v. Moss*, 5 Denio, 567; *Phillips v. Therasson*, 11 Hun, 141; *Johnson v. Somerville Dyeing, &c. Co.*, 15 Gray, 216; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Mokelumne Hill, &c. Mining Co. v. Woodbury*, 14 Cal. 265; *Larrabee v. Baldwin*, 35 Cal. 155; *Williams v. Hanna*, 40 Ind. 535; *Rosevelt v. Brown*, 11 N. Y. 148; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurot*, 37 Ohio St. 26; *Weber v. Fickey*, 47 Md. 196.

Whether the renewal of a note is to be regarded as the making of a contract or the creation of a debt within the meaning of statutes of this description, see *Wheeler v.*

serve no useful purpose to examine them in detail. The question is a simple question of construction to ascertain the expressed legislative will, and an attempt to solve the question by any process of reasoning based upon the analogies of the common law cannot but lead to confusion.

§ 890. *Liability of Past Members.*—In some instances, it has been expressly provided by statute that shareholders should continue liable for debts incurred while they were members of the company, notwithstanding a transfer of their shares. In other instances, past members remain liable for a limited period of time.¹ Under the English Companies Act of 1862, past members remain liable to creditors for a limited period of time. Neither past nor present shareholders can be charged individually, except on winding up the company, and then only present shareholders can be charged primarily; past members can be compelled to contribute only after the existing members have been exhausted.²

It is clear that the right to create a novation of the individual liability of a shareholder by a transfer of his shares cannot be implied where it appears to have been the intention of the legislature that creditors should be entitled at all times to look to those persons for security who were shareholders at the time they contracted with the company.

Where individual liability to creditors is imposed upon the directors or shareholders of a corporation as a penalty for neglecting to perform some duty cast upon them by their charter, it is clearly the intention of the legislature that those parties who are guilty of the neglect shall alone suffer the penalty. Hence, under a provision of this description, the individual liability does not pass to the successors in office or transferees of those who were directors or shareholders of the company at the time when the charter was infringed.³

Faurot, 37 Ohio St. 26; Castleman 414; Union Bank v. Wando Mining, v. Holmes, 4 J. J. Marsh. 1; Milliken & Co., 17 S. Car. 339.

v. Whitehouse, 49 Me. 527; Fisher ¹ See Ingalls v. Cole, 47 Me. 530; v. Marvin, 47 Barb. 159; Parrott v. Fuller v. Ledden, 87 Ill. 310; Trippe Colby, 6 Hun, 55; Jagger Iron Co. v. Hunccheon, 82 Ind. 307.

v. Walker, 43 N. Y. Super. Ct. 275; ² *Supra*, § 859.

Freeland v. McCullough, 1 Denio, ³ Windham Provident Inst. v.

§ 891. **When a Transfer of Shares does not discharge from Liability.** — The right of transfer is conferred only for legitimate business purposes. It cannot be exercised in fraud of the other members of the company, or for the purpose of defeating the claims of creditors. Hence, a shareholder cannot escape individual liability to creditors after the corporation has become insolvent, and the shares a burden to the owner, by transferring them to a person who cannot perform the obligations thereby cast upon him. Neither the other shareholders nor the creditors of the company can be held to have assented to a novation under these circumstances.¹

§ 892. **Statutes authorizing Levy upon the Property of Shareholders.** — In some States statutes have been passed giving creditors who have obtained judgment against a corporation the right to levy upon the property of the individual corporators. Statutes of this description are clearly not in violation of a constitutional prohibition against taking private property without due process of law.²

The rule in England is, that, in those cases in which a judgment against a company or a public officer can be enforced against a shareholder, a *scire facias* is a necessary preliminary, unless there be some statutory enactment to the contrary.³ But in Massachusetts, under the statutes which render individual members of manufacturing corporations liable for the debts of the corporation, it is held that no *scire facias*, or other process or summons, can issue against an individual shareholder; but he is charged, at the peril of the creditor, on the same process which issues against the corporation.⁴

Sprague, 43 Vt. 502; Tracy v. Yates, 18 Barb. 152. celling their subscriptions. Vick v. La Rochelle, 57 Miss. 602.

¹ Davis v. Stevens, 17 Blatchf. 259; Aultman's Appeal, 98 Pa. St. 505; McClaren v. Franciscus, 43 Mo. 452; Marcy v. Clark, 17 Mass. 830; Dauchy v. Brown, 24 Vt. 197. ² Marcy v. Clark, 17 Mass. 830, 835.

And see *supra*, § 858. ³ 1 Lindley on Partnership (4th ed.), 520; Bartlett v. Pentland, 1 B. & Ad. 704; Clowes v. Brettell, 10 M. & W. 506.

It is clear that a corporation cannot put an end to the individual liability of its shareholders by can- ⁴ Stone v. Wiggin, 5 Metc. (Mass.) 818, *per* Shaw, C. J.

Under the Massachusetts statute of 1851, requiring a summons to be left with a shareholder of a corporation before his property can be taken upon an execution directed against the corporation, a shareholder is entitled to appear and make every defence bearing upon the question of his membership; but he cannot contest the validity of the plaintiff's claim; and if he fails to appear, he thereby voluntarily submits to any liability which may legally attach to him as such member.¹

§ 893. *Proceedings to enforce the special Individual Liability.* — In order to determine whether proceedings can be maintained to charge the shareholders of a corporation with individual liability for the debts of the association, it is necessary to consider two distinct questions. These are: —

First. What are the substantial rights of the parties?

Secondly. What remedies have been provided by law for the enforcement and adjustment of these rights?

If the members of a corporation are rendered individually liable for the corporate debts, and no special remedy is provided for the enforcement of this liability, it is clear that the usual legal and equitable remedies must be adapted to the requirements of the case. But where a special remedy is given, it seems to be a rule of construction that the legislature must be held to have intended to exclude every other remedy.²

§ 894. *Equities to be considered.* — While the character and extent of the individual liability of the shareholders in a corporation depend wholly upon the terms of the law by

¹ *Holyoke Bank v. Goodman* St. Albans Hotel Co., 47 Vt. 313; *Paper Co.*, 9 Cush. 576, 584, *per* Pollard v. Bailey, 20 Wall. 520; *Dewey, J.* See also *Farnum v. Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 49; *Youghioghenny Shaft Co. v. Evans*, 72 Pa. St. 331, 334; *Cush. 507*; *Robbins v. The Justices*, 12 Gray, 225; *Handrahan v. Cheshire Iron Works*, 4 Allen, 396; *Mason v. Cheshire Iron Works*, Id. 398. *O'Reilly v. Bard*, 105 Pa. St. 569; *Bunn's Appeal*, 105 Pa. St. 49; *Diven v. Lee*, 36 N. Y. 302. See

² *Knowlton v. Ackley*, 8 Cush. 93, 98; *Erickson v. Nesmith*, 15 Gray, 222; *Allen v. Walsh*, 25 Minn. 543; *Windham Prov. Inst. v. Sprague*, 43 Vt. 502; *Bassett v. Andrews v. Callender*, 13 Pick. 484; *Potter v. Stevens Machine Co.*, 127 Mass. 592; *Grose v. Hilt*, 36 Me. 22, 25.

which it is created, it often becomes necessary in enforcing this liability to consider the equities arising out of the relationship between the parties.

1. The relation existing between the shareholders gives each shareholder a right as against every other shareholder to insist that any losses sustained in their joint speculation shall be ratably apportioned. This rule applies as well to losses sustained through an extra individual liability to creditors, as to losses of capital originally subscribed for the purpose of carrying on the company's business. Hence, if any portion of the shareholders in a corporation are charged individually with more than their proportionate share of the corporate debts, they are entitled to recover contribution from the other members; and in winding up an insolvent corporation in equity, all the shareholders must be assessed ratably.¹

2. The equitable right of creditors of an insolvent corporation to have all the assets, including the unpaid stock liability of the shareholders, distributed ratably among them, does not arise out of any contractual relation or mutual rights and obligations existing between the creditors, but it results from the nature of their equitable claim upon the company's capital. The legal principles upon which this rule is based have no application to an individual liability imposed upon the shareholders for the benefit of creditors. A liability of this character is not a part of the assets of the corporation, and is not pledged by the latter to its creditors; it is a liability running directly from the members to the creditors of the association, and its character and extent depend wholly upon the particular provision by which it is created. There is, however, obvious justice in giving the creditors of an insolvent corporation equal rights in enforcing the individual liability of its shareholders, where the extent of this liability is limited, and all the creditors cannot be fully paid. And for this reason the courts are always inclined to hold that a liability of this character is intended for the equal benefit of all the creditors, and that no creditor can obtain a preference

¹ See *supra*, §§ 814, 815.

at the expense of the others, unless the contrary be expressly provided.¹

§ 895. *When a Creditor may sue at Law.* — Under some of the statutes imposing individual liability upon shareholders for the corporate debts, it has been held that any creditor may maintain an action at law against any shareholder to enforce his liability for the payment of the debt.

Thus, in *Bank of Poughkeepsie v. Ibbotson*,² the Supreme Court of New York held that the members of a corporation might be charged severally, at law, under a statute declaring that "for all debts due and owing by the company at the time of its dissolution the persons then composing it shall be individually responsible to the extent of their respective shares of stock." The same rule was applied under a statute providing that the stockholders of a corporation shall, "to the amount of the stock by them held, be *jointly* and *severally* liable for all the debts and responsibilities of such company";³ and a like conclusion was reached in the construction of a statute providing that "all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company."⁴

¹ See *Coleman v. White*, 14 Wis. 700. *Infra*, § 897 *et seq.*

² *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479. See also *Hull v. Burtis*, 90 Ill. 218; *Fuller v. Ledden*, 87 Ill. 810; *McCarthy v. Lavasche*, 89 Ill. 270; *Thebus v. Smiley*, 110 Ill. 316.

³ *Grund v. Tucker*, 5 Kans. 70. See also *Norris v. Johnson*, 84 Md. 485; *Matthews v. Albert*, 24 Md. 527; *Culver v. Third National Bank*, 64 Ill. 530.

⁴ *Flash v. Conn*, 109 U. S. 871. See also *Pfohl v. Simpson*, 74 N. Y. 137; *Mathez v. Neidig*, 72 N. Y. 100, 104; *Agate v. Sands*, 78 N. Y. 620; *Smith v. Londoner*, 5 Col. 865; *Van Hook v. Whitlock*, 3 Paige, 409;

Garrison v. Howe, 17 N. Y. 458; *Bond v. Appleton*, 8 Mass. 472.

See, however, *Harper v. Union Manuf. Co.*, 100 Ill. 226; *Low v. Buchanan*, 94 Ill. 76.

In some of the cases the remedy of creditors has been held to be at law, on the theory that, where a statute creates a liability and does not determine the forum in which the remedy shall be sought, the remedy is invariably at law. See *Wincock v. Turpin*, 96 Ill. 135; *McCarthy v. Lavasche*, 89 Ill. 270. However, this theory and its application to a case of this kind are equally erroneous. Compare *Patterson v. Lynde*, 106 U. S. 519.

§ 896. *Remedy in Equity concurrent.*— However, the remedy by action at law does not exclude the remedy by bill in chancery. The scope of the two remedies is not the same. In an action at law, no final adjustment of the rights and equities existing among the shareholders and creditors is possible; in a proceeding in chancery, however, all rights and equities can be fully adjusted and protected. The general rule therefore is, that, although a creditor may sue the individual shareholders at law to enforce their statutory liability, the courts of equity retain jurisdiction for the purpose of enforcing ratable contribution among the shareholders, and making a just distribution of the proceeds of the liability among the company's creditors.¹

§ 897. *When a Creditor can insist upon a General Distribution in Equity.*— Ordinarily the individual liability of the members of a corporation is imposed by statute for the purpose of providing a general fund, in addition to the company's capital, for the security of creditors in the event of the company's insolvency. Where this is the case, and the liability is limited in extent, and there is reason to apprehend that the proceeds in addition to the company's capital will not be sufficient to satisfy all the creditors in full, every creditor would be equitably entitled to receive a ratable share of the general fund. Under these circumstances, the right to a ratable distribution of the fund in equity would rest upon the same principle as the right to a ratable distribution of the company's assets.² Particular creditors ought therefore not to be allowed to exhaust the liability of the shareholders, leaving the other creditors without a ratable share of the security.

¹ *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Pfohl v. Simpson*, 74 N. Y. 187; *Bank of U. S. v. Dallam*, 4 Dana, 574; *Masters v. Rossie, &c. Mining Co.*, 2 Sandf. Ch. 301; *Van Hook v. Whitlock*, 3 Paige, 409; *Matthews v. Albert*, 24 Md. 527; *Norris v. Johnson*, 84 Md. 489; *Thebus v. Smiley*, 110 Ill. 316.

As to the rule in Pennsylvania, see *Patterson v. Wyomissing Manuf. Co.*, 40 Pa. St. 117; *Hoard v. Wilcox*, 47 Pa. St. 51; *Mansfield Iron Works v. Willcox*, 52 Pa. St. 377. In Michigan, see *Milroy v. Spurr Mt., &c. Mining Co.*, 43 Mich. 231; *Thompson v. Jewell*, Id. 240.

² See *supra*, § 861 *et seq.*

Any creditor would be entitled to institute proceedings in equity in order to enforce an equitable distribution of the common security, and to prevent the other creditors from securing an unjust preference by suing in the courts of law.¹

§ 898. *Same Point. — Set-off by Shareholders.* — Upon the same principle, it follows that, if the liability of a shareholder is of the character referred to in the preceding section, he cannot, when sued in equity, set off against this liability a debt due to him from the corporation. He would only be entitled to share ratably with the other creditors the fund contributed by himself and the other shareholders. The rule upon this subject was stated by Denio, J., as follows: "Under the manufacturing act, and in some other corporations, a creditor might sue a single stockholder, who might set up, in reduction of his liability, that he was also a creditor. In such a case no account could be taken, and it would not regularly appear but that the plaintiff's debt was the only one existing against the corporation, nor could it be shown but that there were other stockholders who were not creditors whose liabilities were sufficient to satisfy the plaintiff's debt. In such a case, the defendant ought to be exonerated to the extent of his debt. But under a proceeding for winding up a corporation, where an account of all the debts and of the effects, including the aggregate liabilities of the stockholders, is required to be taken, there is no reason why a creditor should be in a better position on account of being at the same time a stockholder. . . . If he could set off his claim as a creditor against his liability as a stockholder, he might be paid in full, while the

¹ See *Pfohl v. Simpson*, 74 N. Y. 137; *Mathez v. Neidig*, 72 N. Y. 100. Compare *Chicago v. Hall*, 108 Ill. 342; *Coleman v. White*, 14 Wis. 700, 702. 816. Compare, however, *State Savings Ass. v. Kellogg*, 63 Mo. 540; *Chicago v. Hall*, 108 Ill. 342.

It has been held that the creditor first suing a shareholder at law is entitled to priority in enforcing the defendant's liability. *Jones v. Wiltberger*, 42 Ga. 575; *Ingalls v. Cole*, 47 Me. 530; *Cole v. Butler*, 48 Me. 401; *Thebus v. Smiley*, 110 Ill.

The rule that a judgment creditor who first sues to reach equitable assets of the debtor is entitled to priority of payment out of the assets, clearly has no application whatever to a suit by a judgment creditor of a corporation to enforce the individual liability of its shareholders.

other creditors would receive only a part of the amount due them."¹

§ 899. **When the Liability must be enforced in Equity.** — In *Pollard v. Bailey*,² the Supreme Court of the United States held that the individual liability of the shareholders of a bank, under a charter providing that the "individual shareholders having shares in said bank shall be bound respectively for all debts of the bank in proportion to their stock holden therein," could not be enforced by an action at law brought by a single creditor against a single shareholder. Chief Justice Waite, in delivering the opinion of the court, said: "The provision for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it. The case is different from what it would be if the charter had provided generally that all stockholders should be individually liable for the payment of the debts. The cases from New York cited upon the argument, and which are supposed to be in opposition to the view we have taken, involved the consideration of such a liability. . . . After an examination of the several sections of this charter, it cannot for a moment be doubted that it was not only the intention to provide for a proportionate liability, but for a *pro rata* distribution among the different creditors according to their several priorities. Every provision is entirely inconsistent with the idea that one creditor could, by an individual suit, appropriate to himself the entire benefit of the security,

¹ *Re Empire City Bank*, 18 N. Y. 200, 227; *Thebus v. Smiley*, 110 Ill. 316; *Grissell's Case*, L. R. 1 Ch. 528; *Black's Case*, L. R. 8 Ch. 254; *Weber v. Fickey*, 47 Md. 196; *Emmert v. Smith*, 40 Md. 123. And see *supra*, § 861.

These cases indicate the principle to be followed in adjusting the liability of a shareholder who is also a creditor of the company. But it is not necessary that a shareholder should actually first contribute the amount of his liability as a shareholder, and subsequently share the

fund with the other creditors; he may be credited in advance with the amount which would come to him out of the fund. If the dividend which he would be entitled to receive as creditor is equal to the assessment which he must bear as shareholder, no actual payment would be necessary. See *Grissell's Case*, L. R. 1 Ch. 528, 536; *Re Empire City Bank*, 18 N. Y. 200; *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777.

² *Pollard v. Bailey*, 20 Wall. 525, 527.

and exclude all others. A common fund was created for the common benefit, to be collected and distributed by the receiver, who was made the common agent of all. There was no liability except for the deficiency. That was to be apportioned and collected for the common benefit."

In a subsequent case in the same court, the learned judge said: "If the object is to provide a fund out of which all creditors are to be paid share and share alike, it needs no argument to show that one creditor should not be permitted to appropriate to himself, without regard to the rights of others, that which is to make up the fund. . . . The language of the charter is peculiar. The stockholders are not made directly liable to creditors. They are not in terms obliged to pay the debts, but are 'liable and held bound . . . for any sum not exceeding twice the amount of . . . their . . . shares.' This, as we think, means that, on failure of the bank, each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations. The provision is, in legal effect, for a proportionate liability by all stockholders."¹

§ 900. The same result was reached by the Supreme Court of Wisconsin, under a statute providing that the stockholders of a corporation should be "individually responsible, to the amount of their respective share or shares of stock, for all its indebtedness and liabilities of every description."² Dixon, C. J., said: "We are of opinion that the liability is primary and absolute, and attaches the moment the debt is contracted by the bank; that it is a liability of all the stockholders to all

¹ *Terry v. Little*, 101 U. S. 216; *myer v. Cannon*, 82 Ind. 457; *Peck Hornor v. Henning*, 98 U. S. 228, 232. See also *Wright v. McCormack*, 17 Ohio St. 86, 95; *Smith v. Huckabee*, 53 Ala. 191; *Spence v. Shapard*, 57 Ala. 598; *Johnson v. Fischer*, 30 Minn. 178; *Low v. Buchanan*, 94 Ill. 76; *Harper v. Union Manuf. Co.*, 100 Ill. 226; *Bullock v. Kilgour*, 39 Ohio St. 543; *Over-*

myer v. Cannon, 82 Ind. 457; *Peck v. Miller*, 39 Mich. 594; *Hurlbut v. Marshall*, 62 Wis. 590.

² *Coleman v. White*, 14 Wis. 700. See also *Allen v. Walsh*, 25 Minn. 543, 552; *Jones v. Jarman*, 34 Ark. 323, 336; *Low v. Buchanan*, 94 Ill. 76; *Patterson v. Lynde*, 106 U. S. 519.

the creditors, on the principle of copartnership, — the stockholders standing on substantially the same footing as though they were partners of an incorporated association, save only that the responsibility of each is limited to a sum equal to his share or shares of stock. . . . We are persuaded that the remedy should be by suit in equity, in which all the creditors should join, or one or more sue for the benefit of all, and that the action should be against the bank and all its stockholders, unless it be impossible or impracticable to bring them all before the court, or some other sufficient cause for the omission be shown. This conclusion, we think, follows necessarily from the nature of the obligation imposed; it being a liability on the part of all the stockholders, in proportion to the amounts of their respective shares, to all the creditors, according to the sums severally due them."

§ 901. *Joinder of Parties at Law.* — The shareholders of a corporation cannot, as a rule, be joined as defendants in an action at law brought to enforce their individual liability; but each creditor must sue each shareholder separately.¹ It has been held, however, that, where the shareholders are liable to an unlimited extent as partners, they must all be sued jointly, and that the omission of any one is good ground for a plea in abatement.²

§ 902. *Joinder of Parties in Equity.* — A suit in equity to enforce the individual liability of the shareholders should be so framed as to adjust, *as far as is possible*, the rights of all the shareholders and creditors. Dixon, C. J., said: "The creditors should all join because they have a common interest in the funds to be realized; or, if the action is commenced by one or more of them, the complaint should be so framed that the others may come in and prove their claims before the court, or a referee, and share in the distribution of the moneys received. All the stockholders should be made defendants, because they too have a common

¹ *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Abbott v. Aspinwall*, 26 Barb. 202, 208; *Perry v. Turner*, 55 Mo. 418.

² *Allen v. Sewall*, 2 Wend. 327. Compare *Strong v. Wheaton*, 38 Barb. 616, 622; *Reynolds v. Felici-ana Steamboat Co.*, 17 La. 397, 407.

interest, and without their presence it is impossible to adjust their rights and liabilities, and protect them from unequal and oppressive burdens. The same reasons exist for making all the stockholders parties to such actions as proceedings against delinquent stock subscribers to compel them to contribute towards the payment of the debts of an insolvent bankrupt corporation. The corporation should be joined, unless it has been dissolved, or its assets wholly exhausted, for the reason that both creditors and stockholders are interested in closing its affairs, and in having its available property appropriated to the payment of debts, without which there can be no final settlement and adjudication of the rights and liabilities of the parties."¹

It is not necessary that all the creditors should actually be made parties to the suit; but all other creditors should be given an opportunity to come in and share in the fund realized.² Nor is it necessary that *all* the shareholders be made defendants. Those whom the court can reach and compel to contribute may be charged primarily, to the full extent of their liability; and any equities existing among the shareholders may be left to be adjusted by subsequent proceedings.³ Where the liability of the shareholders is imposed for the purpose of providing a general fund for the security of creditors, in addition to the company's capital, the proper method of proceeding seems to be to have a receiver appointed, to take charge of the fund belonging to the creditors, and distribute it ratably among them.⁴

¹ *Coleman v. White*, 14 Wis. 700, 702.

² *Pfohl v. Simpson*, 74 N. Y. 137; *Coleman v. White*, 14 Wis. 700. Several creditors cannot bring distinct suits; all must join the same proceeding. *Crease v. Babcock*, 10 Metc. (Mass.) 525. Compare *Perry v. Turner*, 55 Mo. 418.

³ *Erickson v. Nesmith*, 46 N. H. 371.

⁴ A receiver or assignee in bankruptcy would have no power to en-

force this liability under a grant of authority to collect the assets of the corporation. He must have express authority to collect the fund provided for the additional security of creditors. *Supra*, § 869.

Under the National Banking Act a receiver appointed by the Comptroller of the Treasury may bring suit to collect the individual liability of the shareholders in a national bank. *Kennedy v. Gibson*, 8 Wall. 948; and see *supra*, § 882.

The court should properly apportion the liability among the various shareholders within its jurisdiction. A decree *nisi* may be made, that each defendant pay the sum assessed against him within a specified time, and that execution issue against those defendants who fail to comply with the decree. If execution against a portion of the defendants should be returned *nulla bona*, a further assessment should be made, until the liability of the defendants has been exhausted or the plaintiffs have been paid.¹

§ 908. **The Corporation should be made a Party.** — In a proceeding in equity, brought by a judgment creditor to enforce the individual liability of the shareholders on behalf of all the company's creditors, it is usually advisable to make the corporation a party. If the equitable assets of the company have not been fully exhausted, the corporation would ordinarily be a necessary party for the purpose of reaching these assets and adjusting the individual liability of the shareholders.² But even in those cases where the assets of the company have been fully exhausted, it is desirable that the corporation be made a party in order that those creditors who have not obtained judgments against the corporation may come in and establish their claims against it before a master or referee appointed for that purpose in the proceeding.³

§ 904. The cases of *Erickson v. Nesmith*⁴ may be considered instructively in this connection. An action at law was brought in Massachusetts by a creditor of a New Hampshire corporation, to charge a shareholder in the company with individual liability. By the laws of New Hampshire, under which the corporation was formed, its shareholders were rendered individually liable to creditors to the same extent as partners; and it was expressly provided that this liability should be enforced only by bill in chancery.⁵ The Supreme Court of

¹ See *Godfrey v. Terry*, 97 U. S. 171; *Hornor v. Henning*, 98 U. S. 228.

² See *supra*, §§ 883, 884.

³ *Erickson v. Nesmith*, 15 Gray, 222; 4 Allen, 238; 46 N. H.

371.

⁴ *Coleman v. White*, 14 Wis. 700; *Walser v. Memphis, & Co. Ry. Co.*, 19 Fed. Rep. 152; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184.

⁵ The provisions of the statute are quoted in 46 N. H. 371, 374.

Massachusetts held that the action could not be maintained. Bigelow, J., delivering the opinion of the court, said: "It is clear that the plaintiffs in this action seek to enforce against the defendant a liability, created by the statutes of a foreign State, by a remedy which operates with greater hardship on our citizens than the remedy provided by the statute itself, and which alone they could pursue in that jurisdiction."¹

Subsequently a bill in chancery was brought by the same plaintiff against the defendant, together with other shareholders residing in Massachusetts. But the court again held that the proceedings could not be maintained, and dismissed the bill. Dewey, J., in delivering the opinion, said: "When the statute confers a right and prescribes a remedy, that particular remedy, and that only, can be pursued. The only remedy given by the statute of New Hampshire is by a bill in equity. Such a bill, as it seems by the decision of the court of that State in *Hadley v. Russell*,² means a bill in behalf of all the creditors against all the stockholders. This was assumed in the opinion of this court in the former case between these parties. . . . If that be so, we perceive at once strong reasons why such a bill should be brought in the State which created the corporation, and where the same is located by the express terms of its charter, and where its place of business is. The effect of maintaining such a bill is to draw before the court all the stockholders, and necessarily, as we should suppose, the principal debtor, the corporation itself. . . . But we have no jurisdiction that will reach such corporation out of this Commonwealth, and having no assets here; and the same is true of the stockholders residing in New Hampshire."³

In a suit in equity brought by the plaintiff in New Hampshire against the shareholders residing in that State, it was held that the defendants were liable as partners for the whole of the company's debts. And it was decreed that the whole

¹ 15 Gray, 222.

² 40 N. H. 109.

³ 4 Allen, 233. On the same

point see *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184.

liability should be apportioned between the defendants *pro rata* according to the amount of stock owned by them, each paying such proportion of the whole debt as his stock bore to the whole amount of stock owned by the solvent shareholders who were made parties to the bill. The court also held that those shareholders who had paid more than their just proportion of the company's debts were entitled to recover contribution from the other shareholders, whether residing in New Hampshire or in Massachusetts.¹

§ 905. *Compliance with Conditions Precedent must be shown.* — Creditors of a corporation seeking to enforce the individual liability of shareholders must allege and prove the fulfilment of every condition precedent to the liability imposed by agreement of the parties, or by the statute under which the liability is created.²

Thus, in New York, under the general act of 1848 for the incorporation of various classes of companies, a creditor seek-

¹ 46 N. H. 371. The liability of the shareholders in this case was of such a character that it could be enforced only by general winding-up proceedings, resulting in an equal apportionment of the liability and distribution of the proceeds. For this reason the action at law brought in Massachusetts could not be maintained: not because the State of New Hampshire had enacted that the liability of the shareholders should be enforced in equity, for this provision had no extra-territorial force (see *supra*, § 876); but because the rights of the parties could not possibly be adjusted in an action at law. The bill in equity brought in Massachusetts was dismissed for similar reasons. The corporation was a foreign one, and both it and many of the shareholders were not within the jurisdiction of the court.

However, the court of equity in Massachusetts had jurisdiction to enforce the liability and adjust the

equities of the shareholders so far as they could be made parties to the suit; and the suit might have been entertained by the court if the circumstances had not been such as to make it inequitable to proceed against the shareholders in Massachusetts before exhausting the remedies in New Hampshire. The court might have allowed the plaintiffs to proceed in Massachusetts subject to such terms as were equitable with respect to an apportionment of the liability among the shareholders in and out of the State. If the plaintiffs had first exhausted their remedies in New Hampshire, or if they had shown that proceedings in New Hampshire would have been unavailing, it is probable that the bill in equity in Massachusetts would have been sustained.

² See *Blair v. Gray*, 104 U. S. 769; *Chase v. Lord*, 77 N. Y. 1; and see cases *supra*, § 888 *et seq.*

ing to charge the stockholders with individual liability, under the tenth section of the act, must show, (1.) that the capital was not duly paid in, (2.) that the debt for the payment of which the plaintiff seeks to enforce the liability was a contract debt, and was contracted to be paid within one year, (3.) that an action was brought against the company within one year, and (4.) that judgment was recovered thereon, and execution returned unsatisfied. A receiver or trustee suing on behalf of creditors to enforce the liability of the stockholders would be obliged to show the same facts as the creditors in order to establish a cause of action.¹

PART IV.

STATUTORY LIABILITY OF DIRECTORS TO CREDITORS.

§ 906. *Statutory Liability of Directors to Creditors.* — In many of the States, statutes have been passed, providing that the directors of corporations shall, on certain contingencies, become liable to the creditors of the companies for the payment of their claims. Thus, in some instances it has been provided that the directors shall become liable for the corporate debts, if they fail to publish certain prescribed reports of the financial condition of their company, or if they publish false reports; in other cases, it has been provided that the directors shall become liable if they allow the company's aggregate indebtedness to exceed a fixed amount. The various statutes which have been passed differ widely in their language, and in the construction which they have received. It would be beyond the scope of this treatise to consider them in detail; only a few of the principles relating to the construction of these statutes will be referred to.

§ 907. *The Liability said to be Penal.* — It has often been said by the courts, that the liability imposed by statutes of

¹ *Cuykendall v. Corning*, 88 89 N. Y. 334, overruling 28 Hun, N. Y. 129, 187; *Handy v. Draper*, 256.

this description is "penal."¹ And it has been held that it follows as a consequence, that these statutes must be strictly construed;² that the liability of the directors cannot be enforced outside of the State which enacted the statute imposing it;³ that it cannot be enforced against the representative of a deceased director;⁴ that the liability would cease after a repeal of the law enacting it, and that such repeal would not be unconstitutional as impairing the rights of existing creditors.⁵

§ 908. *Character of the Statutory Liability of Directors.*—

It is not always quite clear what the courts mean to express by saying that statutes of this character are "penal," and that they impose upon the directors a "penal liability."

The liability of the directors under such a statute is undoubtedly not the result of a contract between the directors and the creditors of the corporation; but that is evidently not what the courts mean to express. The liability of directors to creditors for a tort, or a misapplication of corporate funds, or breach of trust, does not arise out of contract; yet the courts would certainly not call this a penal liability, or refuse to enforce it because it arose under the laws of a foreign State.⁶

Nor is the liability of the directors under these statutes penal in the sense in which the word "penal" is used in

¹ *Merchants' Bank v. Bliss*, 85 N. Y. 412; *Wiles v. Suydam*, 64 N. Y. 178; *Garrison v. Howe*, 17 N. Y. 458; *Steam Engine Co. v. Hubbard*, 101 U. S. 188, 191-194; *Moies v. Sprague*, 9 R. I. 541; *Hill v. Frazier*, 22 Pa. St. 320.

² *Whitney Arms Co. v. Barlow*, 68 N. Y. 84; *Victory Webb Printing, &c. Co. v. Beecher*, 26 Hun, 48; *Schofield v. Henderson*, 67 Ind. 258; and see cases in the preceding note.

³ *Derrickson v. Smith*, 27 N. J. Law, 166; *Halsey v. McLean*, 12 Allen, 438; *First Nat. Bank v. Price*, 83 Md. 487; *Veeder v. Baker*, 83 N. Y.

156; *Bird v. Hayden*, 2 Abb. Pr. n. s. 61. Compare *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181.

⁴ *Mitchell v. Hotchkiss*, 48 Conn. 9. Compare *Hargroves v. Chambers*, 30 Ga. 580; and cases *supra*, § 877.

⁵ *Gregory v. German Bank*, 3 Col. 332; *Union Iron Co. v. Pierce*, 4 Biss. 327; *Breitung v. Lindauer*, 37 Mich. 217. See, however, *Hargroves v. Chambers*, 30 Ga. 580.

⁶ In some instances the statutes have merely re-enacted the common law liabilities of the directors. See *Hoffman v. Dickey*, 54 Iowa, 185.

criminal law; it is not a penalty or fine imposed by the State for the infraction of a public law.

The liability of the directors is both in form and in substance a private obligation, similar in many respects to that of sureties. It is imposed by the legislature partly for the purpose of inducing the directors to do their prescribed duties, and partly for the purpose of securing the company's creditors from losses caused by the acts of those who have control over the company's fortunes. The statutes imposing this liability establish a new rule of private right,—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called penal appears to be that it does not exist at common law, and is neither created by contract, nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company.¹

§ 909. The character of the liability of directors to creditors, under statutes of this description, was ably discussed by the Supreme Court of Georgia, in the case of *Neal v. Briggs*.² The plaintiff was a creditor of a banking corporation of which the defendants were directors, and the suit was an action of debt founded upon a provision of the company's charter imposing individual liability upon the directors. By this provision, the directors, under whose administration the total amount of the company's debts was allowed to exceed three times the stock paid in, were made individually liable for the excess; and it was expressly provided that the liability might be enforced by any creditor or creditors against the directors, their heirs, executors, and administrators, in an action of debt. The defence was that the action was barred by the six months' statute of limitations applicable to "fines, penalties, and forfeitures." But the court held that the liability was not a fine, penalty, or forfeiture,

¹ It may be observed that the instructions, is not created by common law liability of a principal for the wrongs committed by his servants within the scope of their authority, but in violation of actual instructions, is not created by contract, nor is it based on the theory that the principal has done a wrong.

² *Neal v. Briggs*, 12 Ga. 104,

111-118.

and that the statute did not apply. Nisbet, J., delivering the opinion, said :—

“It is argued that the liability in this rule must be a penalty, because imposed alone on the directors. It is intended as a punishment for an official assumption of power, to wit, the contracting of debts to an amount larger than three times the amount of the stock paid in, in violation of the charter. If not, proceeds the argument, intended to be punitive, why discriminate between the stockholders who are and those who are not directors? . . . In answer to this reasoning, I admit that it was the intention of the legislature to restrain the directors from over-issues, by making them liable for the excess. This liability, by operating upon the pecuniary fears of the directors, was no doubt intended to secure sound banking, and thus protect the whole community from the evils of an irredeemable currency. . . . The pocket nerve vibrates painfully responsive to the slightest unfriendly touch. But all these admissions do not yield the point that this is a penalty. It may be a *statute liability*, and yet be intended as a punishment and a preventive against abuses. A statute liability might just as well originate in such a policy as a penalty, and, I will add, is just as well calculated to promote it. This is something more than a measure of prevention, founded in a policy which looks to the public at large; *it is also a measure of individual security, which creates rights in individual citizens*; and this is the distinction upon which this case, in our judgment, rests. . . .

“Penalties are punishments inflicted by law for its violation. In its broad signification, a penalty means any punishment; but its more specific meaning is a *pecuniary punishment*. When counsel claim this to be a penalty, I understand them to use the word in the last specified sense. That is, they hold that the liability of the directors is a pecuniary punishment for the violation of the charter, which is a public law of the State.

“This is clearly *the kind of penalty* barred in six months by the act of 1776. This kind of penalty, then, is the sanction of a public law, whether that law be mandatory or pro-

hibitory. . . . It is intended to constrain obedience by a pecuniary mulct, and is usually applied to offences not *mala in se*, but *mala prohibita*. It has for its object the enforcement of a law in which all the people of the State are *equally* interested, or the protection of rights common in kind to all the people of the State. . . . One characteristic of all penalties is, that, when recovered, they belong equally to the public, and, except when the informer gets part, they are applied to some designated use. . . . To whom does the recovery belong in this case? To the public, or to an informer in part? No, but to a creditor. He alone can sue for the excess. Before any one can take a benefit under this act, he must show himself to be a creditor; and *eo instanti*, when any citizen becomes a creditor, in case of excess, he has an interest coupled with a right—a personal, individual right—to recover out of the directors the amount of the claim. The charter creates the liability *in favor of individuals, and that distinguishes it from a penalty.*"

§ 910. **The Remedy for enforcing the Liability.**—The form of action by which the statutory liability of directors may be enforced depends upon the character of the liability, unless a particular remedy is prescribed by the statute.

If the liability is imposed for the purpose of providing a fund to secure all the creditors equally, or if an accounting of the company's financial condition is necessary in order to determine the extent of the liability of the directors, a bill in equity appears to be the proper remedy. The case of *Hornor v. Henning*,¹ was of this character. The suit was brought to enforce the liability of directors under a statute providing that, "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." The Supreme Court held that

¹ *Hornor v. Henning*, 93 U. S. Buchanan, 94 Ill. 76, affirming 3 228. See also *Anderson v. Speers*, Bradw. 202; *Buchanan v. Bartow* 21 Hun, 569; *Merchants' Bank v. Iron Co.*, 3 Bradw. 191. *Stevenson*, 10 Gray, 282; *Low v.*

the liability of the directors for the excess of indebtedness over the capital stock was intended as a fund for the benefit of all the creditors who were entitled to share in it, in proportion to the amount of their debts, and that the remedy to enforce the liability was by bill in equity. Justice Miller said: "The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of indebtedness over the capital stock, the amount of this which each trustee assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors, and the amount of their several debts; to determine the sum to be recovered of the trustees and apportioned among the creditors,—in a manner which the trial by jury and the rigid rules of common law proceedings render impossible."

§ 911. Under some of the statutes rendering the directors of corporations liable for the corporate debts, any individual creditor may sue any director, without first exhausting his remedy against the corporation. Whether directors, who have been compelled to pay corporate debts under these circumstances, can recover the amounts which they have been compelled to pay from the corporation, or can recover contribution from their co-directors who have not been charged, depends upon the character of the acts for which the liability of the directors was imposed.

It is evident that, if the acts for which the liability of the directors was imposed were wrongs done by the directors to the corporation or its shareholders, the latter cannot be compelled to compensate the directors for what they have paid. Directors can recover compensation for the amounts which they have been compelled to pay to the company's creditors only if their liability was intended to be similar to that of sureties of the corporation;¹ and it is only where their lia-

¹ Compare *Jones v. Barlow*, 62 N. Y. 202; and see the preceding section. Whether the liability of the directors may survive the in-

debtedness of the corporation, see *Hargroves v. Chambers*, 30 Ga. 581; *Jones v. Barlow*, 62 N. Y. 202.

bility is of this character that they can recover contribution from their co-directors.¹ Directors who have been charged with liability for a joint wrong cannot, as a rule, recover contribution from their co-wrongdoers.²

¹ Compare *Nickerson v. Wheeler*, 118 Mass. 295; *Andrew v. Murray*, 33 Barb. 354. Sometimes the right of contribution is expressly given by the statute. *Ashhurst v. Mason*, L. R. 20 Eq. 225. See also § 12 of chap. 40 of the Laws of 1848 of New York.

² The right of contribution exists only if created by contract, or if there

are equities giving rise to it. Hence there is no right of contribution between joint tortfeasors. This rule must not be confounded with the doctrine that courts will not enforce rights growing out of an immoral transaction. The maxim, *Ex turpi causa non oritur actio*, applies only to cases of actual immorality. See *supra*, § 721.

CHAPTER XI.

FRANCHISES.

§ 922. **The Nature of Franchises.**—The word “franchise” is generally used to designate a right or privilege conferred by law.¹ Thus, when the legislature grants a charter of incorporation, it confers upon the grantees of the charter the right or privilege of forming a corporate association, and of acting within certain limits in a corporate capacity, and this right or privilege is called the corporate franchise.² It is conferred upon the individual grantees, together with such other persons as may become members of the association, either by a transfer of shares and substitution in place of prior members, or by the creation of new shares, which the legislature has authorized the company to issue.³

Sometimes charters of incorporation confer additional rights which do not pertain to the formation of the association, as, for example, the right to take private property under the power of eminent domain, or the exclusive right of establishing a ferry and charging tolls. These rights are also called franchises. Like the corporate franchise, they are conferred

¹ Bouvier's Dict., “Franchise.” In *Bank of Augusta v. Earle*, 13 Pet. 595, Chief Justice Taney said: “Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right.” It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of

the State.” *People v. Utica Ins. Co.*, 15 Johns. 386, 387, *per* Spencer, J.; *Thompson v. People*, 28 Wend. 579, *per* Senator Verplanck; *Spring Valley Water Works Co. v. Schottler*, 62 Cal. 78.

² *Paul v. Virginia*, 8 Wall. 181, *per* Mr. Justice Field.

³ The corporate franchises are sometimes said to belong to the corporation; but this is not accurate. They belong to the shareholders.

upon the original grantees, together with a power of appointing new beneficiaries, by a transfer of membership, or an issue of new shares, authorized by the charter.

§ 923. *The Franchise of Forming a Corporation.*—What is called the franchise of forming a corporation is really but an exemption from a general rule of the common law prohibiting the formation of corporations.¹ In former times, this exemption was granted only in exceptional cases, by a special charter in each instance. It was, therefore, looked upon as something valuable,—as a gift of a special privilege to the grantees of the charter,—and was called a “franchise.” At the present day, however, the prohibition of the common law has been in a great measure repealed by the general incorporation laws. What was formerly the exception has now become the general rule. All persons have now the right of forming corporate associations, upon complying with the simple formalities prescribed by statute. The right of forming a corporation and of acting in a corporate capacity, under the general incorporation laws, can be called a “franchise” only in the sense in which the right of forming a limited partnership or of executing a conveyance of land by deed is a franchise.

§ 924. *What a “Transfer” or “Mortgage” of Franchises means.*—Charters of incorporation often provide, in express terms, that the companies formed under them may mortgage or otherwise transfer their franchises, together with their tangible property. The word “transfer” is here used in a figurative sense. A franchise, being a mere right conferred by law, cannot, in the nature of things, be transferred from one person or company to another, like a piece of property.² A

¹ See *supra*, § 648 *et seq.*

² It is equally clear that a franchise cannot, in the nature of things, be levied upon by execution. *Gue v. Tide-Water Canal Co.*, 24 How. 257; *Randolph v. Larned*, 27 N. J. Eq. 557; *Stewart v. Jones*, 40 Mo. 140; *Richardson v. Sibley*, 11 Allen, 71; *Susquehanna Canal Co. v. Bon-*

ham, 9 W. & S. 27; *Mahoney v. Spring Valley Water Works Co.*, 52 Cal. 161. Compare *Covington Drawbridge Co. v. Shepherd*, 21 How. 112; *City of Palestine v. Barnes*, 50 Tex. 588.

It should be observed that property of a corporation having public duties to perform, like a railroad

provision in a charter or general law authorizing a corporation to transfer its franchises, really means that the corporation shall have the power to appoint other persons, who shall enjoy franchises exactly similar to those originally conferred upon itself. A provision authorizing a corporation to mortgage its franchises, together with its tangible property, is in reality a legislative enactment that the parties who may thereafter become entitled to the property, by foreclosure of a mortgage executed by the corporation, shall be authorized to exercise franchises similar to those originally conferred upon the mortgagor. In either case, the power of the corporation to bring about a transfer of the franchises is merely a power of appointment, and the franchises acquired by the transferees, whether by deed, or by lease, or by purchase at a foreclosure sale, are derived from the act of the legislature purporting to authorize the corporation to convey, lease, or mortgage its franchises.

§ 925. A law providing that the purchasers at the sale of a railroad under a foreclosure of a mortgage should become invested with the franchises of the mortgaging company, would not alter the effect of an existing mortgage, or take anything from the mortgagor; it would operate as an original act of incorporation.

In *Atkinson v. Marietta and Cincinnati Railroad Company*,¹ the Supreme Court of Ohio held that such a law was unconstitutional, because it was a special act of incorporation. It was argued by counsel, that the act did not assume to confer

company, cannot be taken on execution if the company would thereby be disabled from performing these duties. *Infra*, § 1125. But a law expressly authorizing the property to be taken would, by implication, give the purchaser the right to exercise any franchises which are essential to the enjoyment of the property. See *Chesapeake, &c. Ry. Co. v. Miller*, 114 U. S. 176.

franchises and property of a corporation to be sold under an execution would probably be held to mean that the purchasers of the property sold should have a right to exercise franchises similar to those possessed by the company while it was in possession of the property. *Infra*, § 932.

¹ *Atkinson v. Marietta, &c. R. R. Co.*, 15 Ohio St. 21, 38. Compare *Houston, &c. R. R. Co. v. Shirley*, 54 Tex. 125.

A law expressly authorizing the

corporate powers, but was merely declaratory of the effect of the mortgage and the sale of the railroad under the decree of foreclosure. The court, however, said: "It will not do to deceive ourselves with mere forms of expression. It is certain that the mortgagees, as such, were invested with no corporate capacity, and it is equally certain that a mere purchase at the sale would have invested them with none. If they have it, then, it must have arisen in some way from the legal effect of the legislative enactment; and as without the enactment they had it not, and with the enactment are invested with it, it would seem to follow that it was not only conferred *by* the enactment, but also *newly* conferred. It does not belong to human power to make that which is false true, by declaring it to be so."

§ 926. *The Nature of a Grant of Authority to transfer or mortgage Franchises.* — A law authorizing a corporation to transfer or mortgage its franchises has a twofold operation. Primarily, it operates as a grant to the company of a franchise or power of appointment; namely, that of giving rise to franchises in other persons, by executing a nominal transfer or mortgage of its own franchises. After the execution of the power, such a law would operate as an enabling act to the so-called transferees or purchasers under the mortgage; it would confer upon them franchises like those nominally transferred or mortgaged.

Whether the franchise or power of appointment conferred upon the corporation by the law authorizing it to transfer or mortgage its franchises, can be subsequently revoked or altered by the legislature, would depend upon the character of the law. If the law conferring this franchise was intended merely as an enabling act, it would be repealable, like any other law; but if it was intended as an irrevocable grant, constituting a contract between the State and the company, within the meaning of the constitutional prohibition against State laws impairing the obligation of contracts, it would not be repealable. Ordinarily, if such a franchise is conferred by the charter under which the company is organized, it is irrevocable, unless the right of repeal or alteration is

reserved; but if it is conferred by a subsequent act, it will be deemed a mere authorization by the legislature, which may be withdrawn.¹

§ 927. The exercise by a corporation of the power conferred by a law authorizing it to "transfer" or "mortgage" its franchises, would not necessarily deprive the company of any of its own franchises. The franchises conferred upon the appointees under such a power are not properly speaking derived by transfer, but are new franchises, derived by appointment under the act of the legislature. It would depend wholly upon the will of the legislature whether the franchises of the transferring or mortgaging company shall be extinguished, or shall continue in force after the creation of the new franchises in the transferee or purchaser under the mortgage. An attempt of a corporation or its agents to confer franchises upon others, by a nominal transfer or mortgage of its own franchise, without legislative authority, may be made effective by the subsequent ratification of the legislature; for such ratification would of itself constitute a grant of authority to the mortgagee to exercise the franchises attempted to be conferred by mortgage.²

§ 928. **Meaning of a Grant of Power to transfer "a Charter" or "the Franchise to be a Corporation."**—In some cases it has become necessary to consider the meaning of a grant to a corporation of the power to transfer or to mortgage "its charter" or its "franchise to be a corporation." Taken literally, such a grant would be unintelligible; and it may be doubted whether a legislature making such a grant could have any definite meaning in mind. However, if the intention of the legislature is that the corporation shall have the power of conferring the right to form a new corporation upon such persons as it may indicate by a deed of transfer, or as shall become the purchasers under a foreclosure of the mortgage, there is no difficulty in giving effect to the legislative will. In *State v.*

¹ See *infra*, Chapter XV.

s. c. 1 Brunner, Col. Cas. 613;

² *Richards v. Merrimack, &c.* *Shaw v. Norfolk County R. R. Co.*, R. R. Co., 44 N. H. 127; *Hall v.* 5 Gray, 162; *Pollard v. Maddox*, 28 Sullivan R. R. Co., 21 L. Rep. 188; Ala. 321. *Supra*, § 20.

Sherman, the Supreme Court of Ohio said: "The real transaction in all such cases of transfer, sale, or conveyance, in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the *law* under which the transfer is made. The statute authorizing the transfer, and declaring its effect, is the grant of a new charter, couched in few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of the transfer is to be regarded as mere evidence of the surrender or abandonment."¹

§ 929. The "Value" of Franchises. — In speaking of the value of franchises, care must be taken to distinguish between the different meanings of the word "value." One meaning of the word is *price*, or the amount for which a thing can be sold. In this sense franchises have clearly no value whatever, because, by their nature, they are not transferable. They cannot be sold, or leased, or mortgaged, nor can they be taken on execution.² On the other hand, franchises clearly have a value, if the word "value" is used to signify the advantage derived from their possession, or, in other words, their *utility*. The value of a franchise,

¹ *State v. Sherman*, 22 Ohio St. 411, 428, *per* Welch, C. J. The above language of the Supreme Court of Ohio was quoted with approval by Justice Matthews in *Memphis, &c. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609, 622. See also *Oroville, &c. R. R. Co. v. Plumas County*, 37 Cal. 354.

² Where the power of "transferring" or "mortgaging" franchises is expressly conferred by the legislature, the possession of this

power may have a pecuniary value, if the franchises conferred by its exercise are in themselves desirable, and cannot be obtained freely by application to the legislature or under the general laws. Under these circumstances, however, the franchises have not, strictly speaking, a transferable value; but a price is paid for the exercise of the power of appointment, which the power to transfer or mortgage really implies. See the preceding sections.

using the word "value" in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession.

A right accorded to everybody may be of greater value, in this sense of the word, than the most exclusive privilege or franchise.¹ Thus, the right of making ordinary contracts, or of acting through agents, is more valuable in this sense than the franchise of forming a corporation, and the right of owning and buying and selling property is more valuable than the franchise taking property by exercise of the power of eminent domain.

§ 930. **A Corporation has no implied Power to transfer its Franchises.** — The individual shareholders in a corporation have implied authority to effect a practical transfer of their franchises by transferring their shares in the corporation; such a transfer would be a mere substitution of membership in the company, and would leave the legal identity of the corporation unchanged.

It is clear, however, that a corporation has no authority or power to charter a new corporation, or to confer any franchises whatever upon another company or set of persons, unless the power is conferred in express terms, or by necessary implication. An attempt, on the part of the agents of a corporation, to transfer franchises conferred by the State upon the company, would be wholly ineffective and void, unless the State intended to confer a power of making the transfer, operating in the manner pointed out in the preceding sections.²

¹ A franchise would not be deprived of its value, in this sense, by a general act of the legislature conferring upon everybody rights exactly similar to the franchise. *Bedford, &c. R. R. Co.*, 8 Phila. 94; *Middlesex R. R. Co. v. Boston, &c. R. R. Co.*, 115 Mass. 351; *Lyon v. Jerome*, 26 Wend. 485; *Hall v. Sullivan R. R. Co.*, 2 Redf. Ry. Cas. 624; s. c. 21 L. Rep. 138;

² *Thomas v. Railroad Co.*, 101 U. S. 73; *Atkinson v. Marietta, &c. R. R. Co.*, 15 Ohio St. 21; *Hays v. Ottawa, &c. R. R. Co.*, 61 Ill. 422; *Black v. Delaware, &c. Canal Co.*, 24 N. J. Eq. 465; *Wood v. Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. Ch. 837; *Beman v. Rufford*, 1 Sim. n. s. 569; *Winch v. Birkenhead, &c. Ry. Co.*, 5 De G. & S. 562, 579; *Hinckley*

It follows, upon the same grounds, that a corporation cannot legally increase the number of its shares beyond the number fixed by its charter, although all the shareholders give their consent; for by so doing it would, in effect, extend the franchises, granted by the State to a certain number of persons and their transferees, to additional parties, and thus create a new association.¹ So, it is clear that a corporation has no implied authority to form a copartnership, and thereby empower other persons indirectly to obtain the benefit of the franchise which the State conferred upon it alone.²

§ 931. **A Corporation has no implied Power to "mortgage" Franchises.**—The real character and effect of a power to "mortgage" franchises have been pointed out in the preceding sections. A corporation certainly has no such power, unless it was conferred by the legislature in express terms, or by necessary implication.³

932. **Franchises pertaining to the Use of particular Property.**—If the property of a corporation is of such a character as to be adapted only to a particular use, a grant of authority to the corporation to transfer or mortgage the property would by implication include a grant of authority to confer upon the transferee or purchaser under the mortgage the right and power of applying the property to the particular use for which it is adapted. Otherwise, the grant of authority to transfer or mortgage the property would be nugatory. A sale or mortgage of the property would destroy

v. Gildersleeve, 19 Grant (U. C.), N. Y. 43, 50; *State v. Morgan*, 28 212; *Pittsburgh, &c. R. R. Co. v. La. Ann.* 482; *Atkinson v. Marietta, &c. R. R. Co.*, 15 Ohio St. 21; *Pullan v. Cincinnati, &c. R. R. Co.*, 4 Biss. 35. But see *Shepley v. Atlantic, &c. R. R. Co.*, 55 Me. 407; *Kennebec, &c. R. R. Co. v. Portland, &c. R. R. Co.*, 59 Me. 23; and compare *Bardstown, &c. R. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199; *Hall v. Sullivan R. R. Co.*, 21 L. Rep. 138-140; s. c. 1 Brunner, Col. Cas. 613; *Bank of Middlebury v. Edgerton*, 30 Vt. 182.

¹ *Supra*, § 414.

² *Supra*, § 421.

³ *Richardson v. Sibley*, 11 Allen, 67; *Commonwealth v. Smith*, 10 Allen, 448; *Coe v. Columbus, &c. R. R. Co.*, 10 Ohio St. 372; *Carpenter v. Black Hawk Mining Co.*, 65

its usefulness, and confer nothing of value on the purchaser or mortgagee.

This principle of construction has special application to a grant to a railroad company of authority to sell, lease, or mortgage its railroad. The property of a railroad company is practically worthless, except for use and operation as an entire railroad. Railroad companies ordinarily do not own their road-beds, but have a mere right of way or easement for railroad purposes; and even if they own their road-beds in fee, it is evident that the land, and the rails, ties, and other structures, would be of no substantial value without the right of using them as a railroad.

Moreover, it should be observed that the policy of the State is to establish railroads, and maintain them in operation, in order to secure the public benefits which they confer.¹ It is upon this ground alone that the legislature can delegate to railroad companies the power of eminent domain, and aid them in the construction of their works by the use of public property and funds. For these reasons it is a reasonable, and even necessary implication, that, when the legislature authorizes a railroad company to sell, lease, or mortgage its railroad, the intention is that the purchasers, lessees, or transferees under the mortgage shall have the right and power to continue the use and operation of the property as a railroad, and shall be under the same obligations as the prior owner to furnish the public with those railroad facilities which it was the policy of the State to provide. It is immaterial whether the right of using and operating the railroad be regarded as a statutory right called a franchise, or as a license conferred by a municipality, or as a mere easement or property right existing under the common law; a transfer of the property pursuant to authority conferred by law would include a transfer of every right necessary for its continued operation.²

¹ See *infra*, § 1114 *et seq.*

Johnston, 53 Ala. 237, 324; Pierce

² New Orleans, &c. R. R. Co. v. Milwaukee, &c. R. R. Co., 24 Delamore, 114 U. S. 501, 507-509; Wis. 551; East Boston Freight s. c. 34 La. Ann. 1225; Branch v. R. R. Co. v. Eastern R. R. Co., 13 Jesup, 106 U. S. 468, 479; Meyer v. Allen, 422; Randolph v. Wilming-

§ 933. However, only those *franchises* which are *essential* to the use and maintenance of the property transferred are impliedly included in a transfer of the property; other franchises which are not essential to the use and maintenance of the property, although incidental thereto, would not belong to the purchaser of the property, unless expressly conferred by law. Thus it has been held that a legislative authorization of a lease of a railroad would not by implication confer upon the lessee the franchise of exercising the power of eminent domain, in order to complete the railroad or to construct additional lines, although this franchise belonged to company executing the lease.¹

§ 934. **Construction of an express Grant of Authority to transfer or mortgage "Property and Franchises."**—A grant of authority to a railroad company to sell or mortgage "its property and franchises" enables the company to sell or mortgage, not only those rights and franchises which are *essential* to the use of the property as a railroad, but also those which are *incidental* without being essential. Thus a purchaser, under a sale of the company's property and franchises pursuant to such authority, would acquire the power of exercising the power of eminent domain to complete the construction of the railroad, and to build branch lines, if that was one of the franchises of the company owning the railroad.²

§ 935. **It does not include an Exemption from Taxation.**—However, a grant of authority to sell or mortgage the "property and franchises" of a railroad company does not include authority to transfer or mortgage an unusual franchise, like

ton, &c. R. R. Co., 11 Phila. 502. property. See *Detroit v. Mutual Gas Light Co.*, 43 Mich. 594.

R. R. Co., 4 Biss. 42; *Dunham v. Mayor of Worcester v. Norwich*, &c. R. R. Co., 109 Mass. 103; *Pittsburgh, &c. R. R. Co. v. Bedford, &c. R. R. Co.*, 81* Pa. St. 104. See also *Philadelphia v. Western Union Tel. Co.*, 11 Phila. 327.

54 Miss. 106. ² *North Carolina, &c. R. R. Co. v. Carolina Central Ry. Co.*, 88 N. Car. 439.

The same rule applies to a transfer of franchises and rights pertaining to the use of other classes of

an exemption from taxation, which is not necessary to enable the transferee to use and maintain the railroad to its fullest extent, or incidental to its operation. The power to transfer or mortgage such a franchise exists only if it is conferred in the clearest and most unequivocal terms. This has repeatedly been decided by the Supreme Court of the United States.

In *Morgan v. Louisiana*, Justice Field said: "The term [franchise] must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchise to run cars or take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction."¹

In *Memphis, &c. Railroad Co. v. Railroad Commissioners*, the Supreme Court held that a grant of power to a railroad company to borrow money "on the credit of the company, and on the mortgage of its *charter* and works," would confer upon the purchaser, under a foreclosure sale of a mortgage executed pursuant to this provision, only those franchises "which had been granted as appropriate to the construction, maintenance, operation, and use of the railroad as a public highway, and the right to make profit therefrom," and did not include an exemption from taxation.²

In *Chesapeake and Ohio Railway Co. v. Miller*, the Supreme

¹ *Morgan v. Louisiana*, 98 U. S. 465; *Railroad Companies v. 217, 223. See also Wilson v. Gaines, Gaines, 97 U. S. 698. 103 U. S. 417; Louisville, &c. R. R. Co. v. Memphis, &c. R. R. Co. v. Co. v. Palmes, 109 U. S. 244; St. Railroad Commissioners, 112 U. S. Louis, &c. Ry. Co. v. Berry, 113 609, 623.*

Court held that a law providing that the purchasers under a foreclosure sale of a railroad should forthwith be a corporation, and should "succeed to all such franchises, rights, and privileges . . . as would have been had . . . by the first company, but for such sale and conveyance," did not confer an exemption from taxation to the new corporation formed by the purchasers under the foreclosure sale, although this was one of the franchises of the first company.¹

§ 986. **Power to transfer or mortgage the Franchise of forming a Corporation.** — Power to sell or mortgage the franchise of forming a corporation, or in other words to create a new corporation by appointing the incorporators, can never be implied; nor is such a power included in a grant of power to sell or mortgage "the property and franchises" of a company.²

If it were intended by the legislature that the purchasers of the property of a corporation should be incorporated, it is reasonable to suppose that the legislature would indicate the extent of the company's power, the amount of its capital, and give it a charter. All this would be left to be implied, if mere authority to mortgage or sell the franchises of a corporation were sufficient to enable the transferees to form a new corporation.

In *Memphis, &c. Railroad Co. v. Railroad Commissioners*, the Supreme Court of the United States held that the pur-

¹ *Chesapeake, &c. Ry. Co. v. Miller*, 114 U. S. 176. Compare with this case *Humphrey v. Pegues*, 16 Wall. 244, where it was held that a law granting to a railroad company "all the powers, rights, and privileges" granted to another company, would confer exemption from taxation upon the former company, if that was one of the privileges granted to the latter.

An exemption from taxation is included in a reservation by the State of power "to withdraw the franchise" of a corporation. *Railroad Co. v. Georgia*, 98 U. S. 365.

² *Meyer v. Johnston*, 53 Ala. 237, 325; *Coe v. Columbus, &c. R. R. Co.*, 10 Ohio St. 372; *Eldridge v. Smith*, 34 Vt. 484; *Bank of Middlebury v. Edgerton*, 30 Vt. 182, 190; *Smith v. Gower*, 2 Duv. (Ky.) 17; *Joy v. Jackson, &c. Plank Road Co.*, 11 Mich. 172, 173. Compare *Pierce v. Emery*, 32 N. H. 484; *St. Paul, &c. R. R. Co. v. Parcher*, 14 Minn. 297; *Cook v. Detroit, &c. Ry. Co.*, 43 Mich. 349.

In some of the States it is provided by general law that the purchasers of a railroad may organize and form a new corporation.

chasers of a railroad under a foreclosure of a mortgage executed by the company pursuant to a statutory provision authorizing it to mortgage "its *charter* and works," did not acquire the franchise of forming a corporation. Justice Matthews said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons."¹

§ 937. In *Memphis, &c. Railroad Co. v. Railroad Commissioners*, the Supreme Court further held, that, if the charter of a railroad company should expressly provide that the purchasers at a sale of the railroad might organize as a corporation, and should make particular provision as to the mode of procedure to effect that result, such a provision would merely be a matter of law, and not of contract with the company; and that "it would be construed as conferring only a right to organize as a corporation, according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose."²

§ 938. **Remedies for Usurpation or Abuse of Franchises.** — From the nature of a franchise, it follows that it can have no force beyond the jurisdiction of the State which granted it, and that it can be withdrawn or extinguished only by that State.³

The grant of a franchise procured by a fraud upon the legislature is operative until set aside by the State.⁴ Ordinarily, a franchise is not extinguished by reason of non-user

¹ *Memphis, &c. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609, 619. ² *Merrick v. Van Santvoord*, 84 N. Y. 208. *Infra*, § 958 *et seq.*

⁴ *Supra*, § 769.

³ *Ibid.* 609, 621, 622. See *infra*, § 1062.

or abuse ; but such non-user or abuse will enable the State to obtain a judgment of ouster by a judicial proceeding.¹

The ordinary remedy of the State to prevent a usurpation of franchises, or to extinguish franchises, for non-user or abuse, is a proceeding of *quo warranto*. It has been held that this remedy applies only where the franchises in question are State franchises, and that the right of a gas company to lay pipes in a street under permission of the municipal government is not a State franchise, but a local easement, resting in contract or license, the violation of which does not concern the State, and should be redressed by the ordinary legal remedies.²

¹ *Infra*, § 1015. *State v. Woodward*, 89 Ind. 110.

² *People v. Mutual Gas Light Co.*, 38 Mich. 154.

CHAPTER XII

CONSOLIDATION OF CORPORATIONS.

§ 989. **What is a Consolidation?** — Authority is frequently given to corporations, either by special charter or by general law, "to consolidate" with other corporations. The meaning to be attached to the word "consolidate," when thus applied, and the important legal consequences following from a consolidation, have, as yet, been only partly determined by the courts.¹

There is no doubt that the general effect of a consolidation is the formation of one corporation by the shareholders of several corporations, and the dissolution of the latter as originally constituted.² But the important questions remain, What is the constitution of the united corporation, and what franchises belong to it? What are its assets, and what are its rights and liabilities with respect to the debtors and creditors of the original companies?

¹ In England, the union of several corporations or joint-stock companies is effected by a process called "amalgamation." The meaning of the term "amalgamation" seems to be even less settled than the meaning of "consolidation." See Brice on *Ultra Vires* (2d ed.), 706.

² *Clearwater v. Meredith*, 1 Wall. 25, 40; *McMahan v. Morrison*, 16 Ind. 172; *State v. Bailey*, 16 Ind. 46; *Shields v. Ohio*, 95 U. S. 819; *Railroad Co. v. Georgia*, 98 U. S. 859; *Racine, &c. R. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 349; *Atlanta, &c. R. R. Co. v. State*, 68 Ga. 488; *Ridgway Township v.*

Griswold, 1 McCrary, 151; and see cases cited in the following sections.

The distinguishing feature of a "consolidation" is the union of the shareholders of two companies, thereby forming one company. This is essentially different from the purchase by a corporation of the property and concerns of another company at a foreclosure sale; and the fact that the company whose property was sold was declared by statute to be "merged and consolidated" with the purchasing company would make no difference. See *Houston, &c. R. R. Co. v. Shirley*, 54 Tex. 125.

§ 940. *Authority to consolidate not implied.* — It is plain that corporations cannot be consolidated without the consent of the shareholders of both companies, and that this consent cannot be implied.¹ A consolidation would involve the formation of a new company by the shareholders, under a new constitution.

It is equally clear that the consent of the State is essential to the legality of a consolidation, and that this consent does not exist unless expressly given by an act of the legislature.²

§ 941. *Grants of Authority to consolidate.* — Authority to consolidate may be given to corporations at the time of their incorporation, or by subsequent enactment. And the legislature may, by recognizing with approval a consolidation effected by the shareholders of several companies without authority of law, cure the illegality of the transaction, and render the continued existence of the corporation resulting from the consolidation in all respects legal and valid.³

A clause in the charter of a corporation, providing that the company may be consolidated with other companies, enters into the fundamental contract between the shareholders; and under a provision of this character a consolidation may be effected by vote of the majority on behalf of the whole association.⁴ But a legislative grant of authority to a corporation already in existence cannot alter the fundamental contract between the members of the company; and hence a consolidation cannot be effected under authority thus conferred, without the unanimous consent of the shareholders, unless the contrary be provided by their mutual agreement.⁵

A legislative grant to a corporation of authority to consolidate with another company impliedly includes a grant of authority to the latter company to join with the former;⁶

¹ *Supra*, § 396.

² *Pearce v. Madison, &c. R. R. Co.*, 21 How. 442; *Clearwater v. Meredith*, 1 Wall. 25; *Aspinwall v. Ohio, &c. R. R. Co.*, 20 Ind. 492; *State v. Bailey*, 16 Ind. 51.

³ *Bishop v. Brainerd*, 28 Conn. 280; *Mead v. New York, &c. R. R.*

Co., 45 Conn. 199; *Mitchell v. Deeds*, 49 Ill. 416. *Supra*, § 20. Of course the absence of the necessary consent of the shareholders cannot be cured by legislation.

⁴ *Supra*, § 407.

⁵ *Supra*, § 646.

⁶ *Re Prospect Park, &c. R. R.*

but neither company can enter into a consolidation without the unanimous consent of its members, unless this be provided for in the charter to which they have agreed.

§ 942. *The Effect of a Consolidation.* — It has sometimes been stated that whether or not a consolidation involves the dissolution of the consolidating corporation and the creation of a new one, depends upon the statute under which the consolidation takes place.¹

The actual effect of a consolidation, of course, depends upon the statute under which the consolidation takes place. But if, as a matter of fact, the effect of a transaction is the formation of one company out of the shareholders of several companies, it is clear that the one company so formed is different from either of the original companies, whether it be called a new company or not. No one would doubt that a single copartnership formed by the members of two separate firms is a new copartnership, although it profess to be a continuation of one of the old firms, and assume its name and continue its business.

It should, however, be borne in mind, that the term "consolidation" has been applied to various classes of transactions resulting in the union of the shareholders of different corporations; and that a corporation resulting from the consolidation of several distinct companies may, by a fiction, be regarded for certain purposes as a continuation of one of the original companies, although it be in fact a new company. The *legal* identity of a corporation may be preserved, notwithstanding a complete change in its constitution and membership.²

The character of the union of two corporations can often be best defined by stating the process by which this union has, in legal contemplation, been brought about. Thus, two corporations may be united, —

Co., 67 N. Y. 371; Fisher v. Evansville, &c. R. R. Co., 7 Ind. 407. North Missouri R. R. Co., 42 Mo. 68. Compare Railroad Co. v. Georgia, 98 U. S. 362-364; Lauman v. Lebanon Valley R. R. Co., 30 Pa. Co., 46 Md. 1. St. 46.

¹ See Central R. R., &c. Co. v. Georgia, 92 U. S. 670; Powell v. ² Compare *supra*, §§ 811, 812.

(1.) By dissolving both companies and destroying their legal identity, and creating a new corporation out of the members of the old.

(2.) By dissolving one of the companies and destroying its legal identity, while preserving the other company and issuing shares in that company to the shareholders in the dissolved company. In this case, the legal identity of the one company continues unchanged.

(3.) By preserving the legal identity of both companies. This may be done by issuing shares in the one company to the shareholders in the other company in exchange for their shares, thus making the one company the holder of all the shares in the other company; or by regarding the united shareholders of both companies as shareholders in each corporation, both corporations, however, acting under similar charters, and under the same management.¹

These transactions would differ widely in their legal consequences. Whether the result be called a "consolidation," or "merger," or "amalgamation," is merely a matter of definition.

§ 943. **General Character of a Corporation formed by Consolidation.**—A private corporation formed by the consolidation of several companies differs in no respect from other corporations in its nature and constitution. It is a voluntary association of individuals, to whom the State has granted authority to act in a corporate capacity, within certain limits.

The constitution of a corporation formed by consolidation is generally composed of several separate instruments. The franchises of the united company are always derived from the act authorizing the consolidation. Sometimes the same act describes the enterprise of the new company in terms, and thus provides a complete constitution; but more commonly it refers to the charters of the old companies, and expressly incorporates their provisions.

The consolidation of several corporations implies a transfer to the united company of the whole concern of each of

¹ See, for example, corporations the consent of the legislatures of of different States consolidated with both States. *Infra*, §§ 1000, 1001.

the original companies. And, unless the contrary be expressly provided, it seems that the purpose and enterprise of the new company would be to carry on the business of both of the original companies.¹

§ 944. *Character of Statutes authorizing a Consolidation.*— It follows from the inherent nature of franchises that they cannot be transferred like property, but must in all cases be derived from the State.² The franchises of a corporation formed by the consolidation of several companies are derived wholly from the act of the legislature authorizing the consolidation.³

An act of the legislature authorizing a railroad company, formed by the consolidation of two existing companies, to act in a corporate capacity and exercise "all the rights, privileges, and franchises" belonging to the original companies, is clearly a grant of privileges or immunities; and such act is therefore subject to a constitutional provision that "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly."⁴

¹ Compare *infra*, § 946 *et seq.*

It seems that, if a naked power to consolidate is given by law, the consolidating companies may, by agreement among themselves, fix the terms of the consolidation with respect to the rights and liabilities of the several parties. In *Dimpfel v. Ohio, &c. Ry. Co.*, 8 Reporter, 641, s. c. 9 Biss. 127, Drummond, J., said: "It should be further observed, that in authorizing, by the general language which has been referred to in the legislation of this State, the union and consolidation of different lines of road, the means by which this result is to be or has been obtained have not been clearly designated; but that has been left to be adjusted by contracts mutually executed between the parties." See also *Racine, &c. R. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 345.

² *Supra*, § 924.

³ In *Shields v. Ohio*, 95 U. S. 823, 824, Mr. Justice Swayne said: "When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were 'granted' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. . . . It did not acquire anything by mere transmission. It took everything by creation and grant. The language was brief, and it was made operative by reference. But this did not affect the legal result."

⁴ *Shields v. Ohio*, 95 U. S. 819.

In *Railroad Company v. Maine*,¹ the Supreme Court of the United States decided that an act of the legislature authorizing a railroad company to be formed by consolidation of several companies, was an *act of incorporation*, and subject to a general law which provided that "all acts of incorporation" should be liable to be amended, altered, or repealed, at the pleasure of the legislature. And in *Railroad Company v. Georgia*,² the same court decided that an act of the legislature consolidating several railroad companies was subject to a section of the code of Georgia, providing that, "in all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

§ 945. The Supreme Court had previously construed the same provision of the code of Georgia in *Central Railroad Company v. Georgia*.³ It was there held, that an act of the legislature authorizing two railroad companies "to unite and consolidate the stocks of the said two companies, and all rights, privileges, immunities, property, and franchises belonging to or attaching to said companies," under the name and charter of one of them, was not subject to the provision of the code above referred to; and that the company formed by consolidation was entitled to an irrevocable exemption from taxation, to the same extent as the original company under whose name and charter the union had taken place.

The decision was placed upon the ground that the act of consolidation did not create a new corporation, but merely merged one corporation in the other; and that the latter company did not lose its identity, but continued in existence, with new members and enlarged powers.

It is highly probable that this is what the legislature had in mind in passing the act of consolidation, for it was expressly provided that the united company should exist under the name and charter of one of the original companies. The

¹ *Railroad Co. v. Maine*, 96 U. S. 509.

² *Central Railroad, &c. Co. v. Georgia*, 92 U. S. 665; s. c. 54

³ *Railroad Co. v. Georgia*, 98 U. S. 359.

legislature had the power to grant an irrepealable charter, because the provision of the code was itself but an act of the legislature, and therefore subject to repeal; it enacted a rule of construction applicable to future grants of charters, but the intention of the legislature would in all cases remain the governing consideration.¹ The act of consolidation expressly provided that the united company should exist under the name and charter of one of the original companies, and this charter was irrepealable; it seems reasonable, therefore, to suppose that the legislature intended the charter of the united company to be irrepealable also.

Whether the act of consolidation was a grant of a private charter, within the meaning of the provision of the code, is an entirely different question. The act of consolidation was certainly a grant of corporate franchises to the united members of several companies. And if that be "a grant of a private charter," as was held in *Railroad Company v. Georgia*,² the fact would scarcely be altered by a declaration of the legislature that the united company should retain the name and charter of one of the original companies.

§ 946. **What Franchises are conferred by the Act of Consolidation.**—Laws authorizing corporations to be consolidated usually provide that the united company shall be invested with all the rights, privileges, and franchises belonging to the original companies prior to their consolidation. This, by implication, incorporates into the act of consolidation a description of the franchises belonging to the several companies, and the united company is thus expressly authorized to enjoy substantially the same privileges as each of the companies by whose shareholders it was formed. But it is clear that the franchises so conferred are not actually the same as those of the original companies; they are only similar, and must necessarily be adapted to the new constitution of the newly formed association, and to such other changes as necessarily follow from the consolidation.³

¹ *Infra*, § 1107.

² *Railroad Company v. Maine*,

³ 98 U. S. 359. See the preceding section.

An act of the legislature authorizing a consolidation of corporations necessarily involves a grant to the united company of the franchise of acting in a corporate capacity, within the limits of its constitution. It is also a reasonable implication that the united company shall have authority to exercise all such franchises as are necessary to enable it to carry on the business transferred to it.

If an act of consolidation provides expressly that the property, rights, and privileges of the original companies shall be vested in the company formed by consolidation, the latter would be entitled to use and enjoy the property transferred to it, in the same manner as it was used and enjoyed by the original companies. This would be implied in every act of consolidation, although it contain no express grant of the franchises of the original companies.¹

§ 947. A railroad company formed by the consolidation of several companies, and invested by law with all their property, rights, and franchises, is entitled to enjoy the franchises of each of the several companies upon the road originally belonging to it. Thus, it has been held under such an act that the franchise of a railroad company to take land to build its road,² or to mortgage its road,³ or to charge a fixed rate for transportation,⁴ or an exemption of the officers and servants of a company from the duty of serving on juries,⁵ would pass to the consolidated corporation.

If one of the consolidating companies was entitled by its charter to hold its property exempt from taxation, the property would remain exempt from taxation after the consolidation; but the exemption would not extend to any other property acquired by the consolidated company, either at the time of the consolidation or subsequently.⁶

¹ *Tomlinson v. Branch*, 15 Wall. 460; *Green County v. Conness*, 109 U. S. 104; *Powell v. North Missouri R. R. Co.*, 42 Mo. 68; *Zimmer v. State*, 30 Ark. 680. Compare *Rogers v. Oxford, &c. Ry. Co.*, 2 De G. & J. 662, *per Mr. Justice Erle*; and see *supra*, § 932.

² *South Carolina R. R. Co. v. Blake*, 9 Rich. 233.

³ *Mead v. New York, &c. R. R. Co.*, 45 Conn. 199.

⁴ *Fisher v. New York Cent., &c. R. R. Co.*, 46 N. Y. 644.

⁵ *Zimmer v. State*, 30 Ark. 680.

⁶ *Philadelphia, &c. R. R. Co. v.*

§ 948. **Construction of Acts authorizing Consolidations.** — A provision in the charter of a corporation authorizing it to consolidate with other companies, and to transfer to the consolidated company its property and franchises, refers to the property and franchises belonging to the company at the time when the consolidation takes place. The right of consolidation would be a franchise of the company upon which it was conferred, and, it seems, would not be revocable by the State unless the right of revocation was reserved.

A grant to a corporation of the right to consolidate with other companies means, in the absence of an express provision to the contrary, that it may form a consolidated company subject to all the general laws in force at the time of the consolidation. This was decided by the Supreme Court of the United States in *St. Louis, &c. Railroad Co. v. Berry*.¹ The charter of the Cairo and Fulton Railroad Company authorized it to consolidate with other companies. It also contained a provision exempting the road, property, and appurtenances of the company from taxation. After granting this charter the State adopted a constitution providing that all incorporation laws passed thereafter should be subject to a reserved power of alteration and repeal; the constitution also provided that "the property of corporations now existing or hereafter created shall forever be subject to taxation the same as property of individuals." After the adoption of the constitution the company was consolidated with another company, and it was claimed that the consolidated company was entitled to the exemption from taxation belonging to the Cairo and Fulton company. The Supreme Court, however, held that the consolidated company did not acquire the exemption. Referring to the provision of the constitution above quoted, the court said: —

"This rendered it impossible in law for the consolidated

Maryland, 10 How. 376; Tomlinson R. R. Co. v. Virginia, 94 U. S. 718. v. Branch, 15 Wall. 460; City of Compare *supra*, § 935.
 Charleston v. Branch, Id. 470; ¹ St. Louis, &c. R. R. Co. v. Branch v. City of Charleston, 92 Berry, 113 U. S. 465, 475, 476. U. S. 677; Central R. R., &c. Co. v. Compare *supra*, § 937.
 Georgia, Id. 665; Chesapeake, &c.

corporation to receive by transfer from the Cairo and Fulton Railroad Company, or otherwise, the exemption sought to be enforced in this suit.

"It is not an answer to this conclusion to say that the act of consolidation, having been made in pursuance of the tenth section of the charter of the Cairo and Fulton Railroad Company, was the exercise by that company of a right secured to it by contract, which no subsequent constitution or law of the State of Arkansas could impair or defeat. For what was the contract? Construed in the most liberal spirit in favor of the company, it cannot be extended beyond a stipulation, on the part of the State, that the Cairo and Fulton Railroad Company may at any time thereafter, by consolidation with any other railroad company, form and become a new corporation, with such powers and privileges as, at the time when the offer is accepted and acted upon, it may be within the power of the State to confer, and lawful for the new corporation to accept. If acted upon before the law was changed, it might well be that all the powers and privileges originally conferred in the charter of the Cairo and Fulton Railroad Company, including the exemption in question, would have vested in the new company. But, as it was not accepted and acted upon until a change in the organic law of the State forbade the creation of corporations capable of holding property exempt from taxation, it must be presumed that when the original company entered into the consolidation it did so in full view of the existing law, and with the intention of forming a new corporation, such as the constitution and laws at that time permitted."

§ 949. In *County of Scotland v. Thomas*,¹ the Supreme Court of the United States held that a legislative provision

¹ *County of Scotland v. Thomas*, 569; *Harter v. Kernochan*, 108 U. S. 94 U. S. 682, 691, 693. See also 562; *County of Tipton v. Locomotive Works*, 103 U. S. 528; *Wagner v. Meety*, 69 Mo. 150; *State v. Gar-route*, 67 Mo. 445. On the effect of a consolidation with another company after a subscription for shares has been made, see *infra*, § 951.

authorizing a county to subscribe for shares in a particular railroad company did not become inoperative after the consolidation of the company with another corporation, but that the county had implied authority to subscribe for shares in the consolidated company instead of the company which had ceased to exist. Justice Bradley, delivering the opinion of the court, said: "The amending act which authorized a consolidation with the Iowa Southern Railway Company was in perfect accord with the general purpose of the original charter of the Alexandria and Bloomfield Railroad Company; and, if the other rights and privileges of the latter company passed over to the consolidated company, we do not see why the privilege in question should not do so, nor why the power given to the county to subscribe to the stock should not continue in force. . . . Subscription to the stock was not only a power of the county, but a privilege of the company, — being a portion of the rights and privileges which it obtained by translation from the charter of the North Missouri (Alexandria & Bloomfield) Railroad Company."

It seems difficult to support the decision in this case upon the ground that the power conferred upon the county to subscribe for shares in the railroad company was a franchise of the latter. In *Aspinwall v. County of Davies*,¹ the Supreme Court had decided that a power of this character was not an irrevocable franchise of the company by whose charter it was conferred, and that it might be repealed by the State without impairing the obligation of contracts. It appears, in *County of Scotland v. Thomas*, that the legislature was prohibited, by provision of the constitution adopted before the act of consolidation had been passed, from authorizing any county to subscribe for shares in any corporation in the manner in which the subscription in that case was made. It has been shown that franchises are not, in the nature of things, transferable, and that the franchises of a company formed by consolidation must necessarily be derived from the act of con-

¹ See *infra*, § 1081. Compare *County of Tipton v. Locomotive Works*, 108 U. S. 523.

solidation. If, then, the power of the county to subscribe for shares was a franchise of the company, it must have been derived from the act of consolidation passed after the constitution had gone into force.

However, there seem to be good reasons for holding that the subscription could be made under the authority conferred by the original act purporting to authorize a subscription for shares in the Alexandria and Bloomfield Railroad Company. The purpose of this provision was to enable the county to obtain the benefits of a railroad, and it was of little consequence by what company the road was constructed. A change of the name of the company, or of the amount of its capital stock, or of its charter, would certainly have made no difference if the legal identity of the company was preserved and the road was constructed substantially as contemplated. The State had expressly reserved the power to alter or amend the charter of the Alexandria and Bloomfield Railroad Company. It may be held, therefore, that the provision enabling the county to subscribe for shares in the latter company, by implication included power to subscribe for shares in the company into which it was transformed by the union with another company, and the adoption of a new name.¹

§ 950. *Duties to the State of a Corporation formed by Consolidation.* — A corporation formed by the consolidation of several companies is subject to all the duties and obligations to the public which rested upon the original companies with regard to the use of the property acquired from them.²

§ 951. *Rights of Shareholders of Consolidating Companies.* — A corporation cannot consolidate with another company, even pursuant to legislative authority, except with the consent of all its shareholders. An unauthorized consolidation may be prevented by any dissenting shareholder,³ or may be

¹ Compare *infra*, § 951.

² *Tomlinson v. Branch*, 15 Wall. 460; *Chicago, &c. R. R. Co. v. Moffitt*, 75 Ill. 524; *Western Union R. R. Co. v. Smith*, 75 Ill. 497; *Gould v. Langdon*, 43 Pa. St. 365;

Peoria, &c. Ry. Co. v. Coal Valley Mining Co., 68 Ill. 489; *infra*, Chapter XVI.

³ See *supra*, §§ 395, 396. Compare *Terhune v. Midland R. R. Co.*, 38 N. J. Eq. 423.

treated as a ground for severing his connection with the company by a rescission of his subscription.¹

However, if the charter of a corporation, or any general law in force at the time when the corporation was formed, provides that the corporation may consolidate with other companies, a consolidation may be effected pursuant to this authority by vote of the majority, against the wishes of a minority. Dissenting shareholders cannot under these circumstances prevent the majority from effecting a consolidation, nor can they treat a consolidation as a ground for rescinding their connection with the company. Accordingly, it has repeatedly been held that, if the general laws under which a railroad company is organized provided that it may consolidate with other companies, a subscription for shares in the company is not rescinded by a consolidation effected pursuant to such laws, but may be enforced by the consolidated company as the successor of the former companies.² The shareholders of each of the original companies become shareholders of the consolidated company, pursuant to the scheme of consolidation, and may claim all the rights of shareholders without any further action on their part, as their assent must be deemed to have been given in advance when they originally subscribed for their shares.³

§ 952. Effect of Consolidation upon Property and Contract Rights. — In determining the consequences of a consolidation upon the contracts and property of a corporation, it is important to distinguish between the function of the legislature and of the corporators in effecting the consolidation.

A State has no power, under the constitutional limitations, to impair the obligation of contracts, or to take away private

¹ *Supra*, § 119. Compare *Hoey v. Henderson*, 82 La. Ann. 1069.

² *Supra*, § 407. *Nugent v. Supervisors*, 19 Wall. 241; *Wilson v. Salamanca*, 99 U. S. 499; *Green County v. Conness*, 109 U. S. 104.

Bonds voted by a municipality in aid of a railroad company, which, under a law then in force, is subsequently consolidated with another

company, may properly be delivered by the municipal authorities to the consolidated company. *New Buffalo v. Iron Co.*, 105 U. S. 78; *Bates County v. Winters*, 112 U. S. 325; *Niantic Savings Bank v. Town of Douglas*, 5 Bradw. 579.

³ *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 413.

property without making just compensation. It follows, therefore, that whatever effect a consolidation may have upon existing property and contract rights, no material alteration can be brought about without the consent of the parties interested. It is to be observed, however, that the prohibition of the Constitution is intended for the protection of substantial rights only; the States have unrestricted power to regulate mere matters of form and procedure.

§ 953. **Property and Contract Rights of a Company formed by Consolidation.** — The consolidation of several corporations implies a conveyance to the united company of the property and contract rights belonging to the dissolved companies, so far as they are in their nature assignable.¹

The legal right or title to choses in action cannot be transferred at common law, but the real or equitable interest may be assigned; and it is a mere question of remedy in such case in whose name or in what forum the right shall be enforced. When corporations consolidate, the real interest in their choses in action is transferred to the united company by act of the parties; and the legal title of the original companies is lost by their dissolution. It is, therefore, no more than reasonable to hold that an act of the legislature consolidating several companies impliedly invests the new corporation with the *legal* title to the choses in action transferred to it.

§ 954. **Effect of Consolidation upon Rights of Creditors.** — Parties cannot transfer their debts and liabilities to others, and thereby discharge themselves. Any State law purporting to authorize such a transaction would be unconstitutional, because impairing the obligation of contracts.

It seems clear, therefore, that a corporation cannot discharge its liabilities by transferring them to another company; and the creditors of a corporation cannot be compelled by

¹ *Lightner v. Boston, &c. R. R.* 101 Mass. 514; *ler v. Lancaster*, 5 Coldw. 514; *Co.*, 1 Lowell, 338; *Paine v. Lake* 100 Mass. 380; *Zimmer v. State*, 30 Ark. 680; *De- Erie, &c. R. R. Co.*, 31 Ind. 283; *troit, &c. R. R. Co. v. Starnes*, 38 Rome, &c. R. R. Co. v. Ontario, Mich. 698. *&c. R. R. Co.*, 16 Hun, 445; *Mil-*

law to accept the liability of a new company, formed by the stockholders of several companies, in substitution of their original rights.¹

However, it does not follow from this, that corporations cannot be consolidated without the consent of their creditors. A trading corporation, like a copartnership, may be dissolved by its members whenever they desire. The dissolution of a corporation, by surrender of its charter, does not destroy the claims of its creditors. Their remedy *at law* is, indeed, lost in such case, unless otherwise provided by statute; but the assets of the corporation remain a trust fund for the payment of its debts.² A consolidation involves the dissolution of the consolidating companies, and the formation of a new and enlarged corporation out of the stockholders of the old companies with their combined capital. Neither of these transactions can be prevented by creditors, inasmuch as their rights are not thereby invaded. The legal liability of the consolidated company would be substituted in place of the legal liability of each of the original companies to its creditors; and the creditors of each of the companies would retain their equitable right to the security furnished by the assets of the company with which they dealt. Liens upon the property of a corporation clearly remain binding after its consolidation with another company.³

§ 955. *When the Consolidated Company is Liable.*—It is usual to provide expressly, in acts of consolidation, that the corporation resulting from a consolidation shall assume all the debts and liabilities of every kind attaching to the several companies before the consolidation. Under these circumstances, the debts and obligations of the consolidating companies may be enforced against the new company, as if it were substituted in place of the original companies;⁴ but the new company assumes no greater obligations than

¹ *Supra*, § 808.

² *Supra*, § 806.

³ *Eaton, &c. R. R. Co. v. Hunt*,

20 Ind. 457; *The Key City*, 14 Wall.
654; *Racine, &c. R. R. Co. v. Farm-*

ers' L. & T. Co., 49 Ill. 331; *Wa-*

bash, &c. Ry. Co. v. Ham, 114 U. S.

587.

⁴ *Columbus, &c. Ry. Co. v. Skid-*
more, 69 Ill. 566; *Western Union*

rested upon the original companies at the time of the consolidation, and contracts which cannot in the nature of things be specifically performed by the new company become extinguished.

*Pullman's Palace Car Company v. Missouri Pacific Railway Company*¹ was a suit to compel a railway company formed by consolidation to perform a contract, which had been made by one of the original companies, to use the complainant's cars on its entire line of railway, and all roads which it might thereafter control by ownership, lease, or otherwise. The act of consolidation provided that the new company should be subject to all the obligations of the original companies. The Supreme Court of the United States held that the new company was under obligation to use the plaintiff's cars upon all roads owned or controlled, at the time of the consolidation, by the company which had made the contract, but not upon any road subsequently acquired by the new company. Chief Justice Waite said: "The power of the old company to get control of other roads ceased when its corporate existence came to an end, and the new company into which its capital stock was merged undertook only to assume the obligations as they then stood. It did not bind itself to run the cars of the Pullman Company on all roads it might from time to time itself control, but only on such as were controlled by the old Missouri Pacific."

Whether a consolidation of corporations pursuant to statutory authority by implication involves an assumption by the new company of the debts and liabilities of the original companies, appears not to be settled by authority. In some cases it has been held that the company resulting from the consoli-

R. R. Co. v. Smith, 75 Ill. 496; *R. R. Co. v. Musselman*, 2 Grant's Warren v. Mobile, &c. R. R. Co., Cas. 848; *Shackleford v. Mississippi* 49 Ala. 582. Compare *Welsh v. Central R. R. Co.*, 52 Miss. 159; *St. Paul, &c. R. R. Co.*, 25 Minn. East Tennessee, &c. R. R. Co. v. 814; *Allen v. Frumet Mining, &c. Evans*, 6 Heisk. 607. The new corporation should be made a party by substitution. *Selma, &c. R. R. Co. v. Harbin*, 40 Ga. 706.

It is often provided that pending suits against the original companies shall not abate. *Baltimore, &c.*

¹ 115 U. S. 587, 595.

dation would not be liable, unless it was expressly rendered liable by the act of consolidation;¹ in other cases it has been held that the liability for the debts of the original companies follows, as an implied incident to the consolidation.² Where a consolidation involves a legal dissolution of the original companies, it seems only reasonable to imply an assumption by the new company of their debts and liabilities; otherwise, there would be no way of enforcing the rights of creditors except by winding up the companies, as in case of a simple dissolution.

§ 956. **Creditors cannot require the original Companies to be wound up.** — The creditors of a corporation which is consolidated with another company are not entitled to have the assets distributed as in case of a simple dissolution; nor do they acquire or hold a lien on the specific property or funds which have been transferred to the consolidated company. Such a result is not contemplated by a consolidation, and a due regard for the rights of creditors does not require that such a result should follow.³

Creditors of a corporation have no lien or claim upon any

¹ *Prouty v. Lake Shore, &c. Ry. Co.*, 52 N. Y. 363; *Powell v. North Mo. R. R. Co.*, 42 Mo. 63; *Shaw v. Norfolk County R. R. Co.*, 16 Gray, 407; *Chase v. Vanderbilt*, 37 N. Y. Sup. Ct. 334. Compare *Selma, &c. R. R. Co. v. Harbin*, 40 Ga. 709; *Montgomery, &c. R. R. Co. v. Boring*, 51 Ga. 582; *Bruffett v. Great Western R. R. Co.*, 25 Ill. 357; *Boardman v. Lake Shore, &c. Ry. Co.*, 84 N. Y. 157.

² *Thompson v. Abbott*, 61 Mo. 177; *Indianapolis, &c. R. R. Co. v. Jones*, 29 Ind. 465. Compare *Columbus, &c. Ry. Co. v. Powell*, 40 Ind. 40. See *Mount Pleasant v. Beckwith*, 100 U. S. 514.

³ In *Wabash, &c. Ry. Co. v. Ham*, 114 U. S. 587, 595, Justice Gray said: "Upon the consolidation, under express authority of statute,

of two or more solvent corporations, the business of the old corporations is not wound up, nor their property sequestered or distributed; but the very object of the consolidation, and of the statutes which permit it, is to continue the business of the old corporations. Whether the old corporations are dissolved into the new corporation, or are continued in existence under a new name and with new powers, and whether in either case the consolidated company takes the property of each of the old corporations charged with a lien for the payment of the debts of that corporation, depend upon the terms of the agreement of consolidation, and of the statutes under whose authority that consolidation is effected."

specific property belonging to the company while it continues its business operations, nor can they prevent the corporation from dealing with its assets, and transferring them in regular course of business. Creditors cannot complain of any change in the name, constitution, or membership of the corporation with which they contracted, provided their substantial rights are preserved. They are merely entitled to the preservation of the general fund upon the security of which they contracted, and to have their claims paid out of the assets belonging to the company when their claims mature.¹

After the consolidation of a corporation with another company, the liability of the consolidated company is substituted in place of the liability of each of the original companies to its creditors, at least to the extent of the assets received. The consolidated company takes the assets of the original companies burdened with the obligations which these companies owed to their creditors, but not with greater obligations. It cannot wilfully divert these assets from the company's business, or restore the capital to the shareholders in any form, but it may deal with these assets just as the original companies could deal with them. It may transfer the assets in due course of business, and may execute mortgages upon the property received from the original companies, for the purpose of raising money on credit. Such mortgages would undoubtedly have priority over the claims of the creditors of the original companies.² In considering the rights of the creditors of the original companies, the consolidated company may be regarded as a continuation of each of these companies, with a change of its name and constitution, and of the amount of its capital stock. Creditors would have no right to complain of this if their security was not impaired.³

§ 957. *Equities between Creditors of the different Companies.*

— The security upon the faith of which the creditors of a corporation have given credit to the company cannot be reduced without their consent. Hence a corporation consoli-

¹ *Supra*, Chapter X.

² See *Wabash, &c. Ry. Co. v. Ham*, 114 U. S. 587, 595.

³ *Supra*, §§ 807, 810.

dating with another company whose creditors are less fully secured than its own, cannot give to the creditors of that company an equal claim with its own creditors upon the combined assets of both companies. The creditors of each of the original companies would have an equitable claim to be paid out of the assets of the company with which they contracted, in preference to the creditors of the other company. However, they would not be entitled to any preference over the creditors whose claim arose after the consolidation, the consolidated company having a right to incur new debts just as if it were a continuation of the original company with an amended constitution.

It should be observed that the equitable claims of creditors of a corporation upon its assets can ordinarily be enforced only in the event of the company's insolvency,¹ and this remains true after the corporation has become part of a new company by a consolidation. The creditors of a corporation which has consolidated with another company must primarily enforce their claims against the consolidated company by the usual remedies applicable to corporations and individuals alike.

¹ *Supra*, Chapter X.

CHAPTER XIII.

FOREIGN CORPORATIONS.

PART I.

§ 958. *The Validity of Acts performed by a Corporation outside of the State under whose Laws it was formed.*¹—In order to determine the validity of a corporate act, it is usually necessary to consider the application of several distinct principles of law.² As a rule, a corporation can act only through its agents. It is therefore usually necessary, in determining the validity of a corporate act, to consider in the first place whether the corporation can be charged with the act by application of the established rules and principles of the law of agency. Assuming that the corporation is responsible for the act according to the law of agency, the question arises whether the corporation itself had a legal right to do the act, and, if not, how far the validity of the act is affected by the illegality. The consideration of these questions is equally necessary, whether the act was performed in the State under whose laws the corporation was formed, or in a foreign State.

It is implied in the charter or articles of association of every corporation, in the absence of an express provision to

¹ The term "foreign corporation" is applied to any corporation outside of the jurisdiction of the State by which it was chartered. The definition given by the New York Code of Civil Procedure is as follows: "A 'domestic corporation' is a corporation created by or under the laws of the State, or located in the State, and created by or under the laws of the United States, or by or pursuant to the laws in force in the Colony of New York before the 19th day of April, in the year 1775. Every other corporation is a foreign corporation." Code of Civ. Proc., § 8343, subd. 18.

² *Supra*, Chapter IX.

the contrary, that the business of the company may be carried on in the usual manner, and by the usual agencies, abroad as well as at home. The shareholders of the company must be held to have impliedly agreed to this, and to have invested the company's agents with the necessary authority.¹

The legality of an act undoubtedly depends upon the laws in force where the act is done. A State cannot, by chartering a corporation, confer upon it a legal right to act within the jurisdiction of another State; but the legal right to act in a foreign State may always be extended to a corporation by the laws of such foreign State. By the common law rule of comity in force throughout the United States, each State extends to all duly incorporated foreign corporations a legal right to carry on business within its jurisdiction. It may therefore be said to be a general rule, that a corporation can legally carry on its business in the usual way, and by the usual agencies, wherever it may find it convenient and profitable to do so.² The principles underlying this rule, and the limitations which have been made to it, will be considered in detail in the following sections.

§ 959. **A State cannot confer a Franchise outside of its Jurisdiction.** — It is a fundamental principle that the laws of a

¹ *Supra*, §§ 859-361.

² It is sometimes said that a corporation must "dwell" or "reside" in the place of its creation, and that it cannot "migrate" to another sovereignty. *Bank of Augusta v. Earle*, 13 Pet. 588; *State v. Milwaukee, &c. Ry. Co.*, 45 Wis. 579. This language is wholly unmeaning unless it is used in a figurative sense. A corporation may act through its agents in foreign States just like a copartnership or a single individual. Strictly speaking, neither a corporation nor a copartnership can reside or migrate anywhere independently of the individual shareholders composing it; but the State under whose laws the company was formed, or the principal

place of business of the company, may, by a figure of speech, be called its dwelling-place or residence, and may be so regarded within the meaning of the laws. Compare *Stafford v. American Mills Co.*, 18 R. I. 310; *Harding v. Chicago, &c. R. R. Co.*, 80 Mo. 659; *Cook v. Hager*, 8 Col. 386; *Cowardin v. Universal L. Ins. Co.*, 32 Gratt. 445.

In *St. Clair v. Cox*, 106 U. S. 350, 355, Justice Field said: "All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together, and allowed to exercise as a body certain functions, with a right of succession in its members."

State can have no binding force, *proprio vigore*, outside of the territorial limits and jurisdiction of the State enacting them.¹ Hence it follows that a State cannot grant to any person the right to exercise a franchise in a foreign State or country; for a franchise is the result of a law authorizing particular individuals to do acts or enjoy immunities which are not allowed to the community at large.²

Thus, it is clear that the State of New York cannot confer the franchise to be exempt from taxation, or to enjoy a monopoly, or to condemn land, within the limits of the State of Pennsylvania. And the same principle applies with full force to a grant of the privilege of acting in a corporate capacity. In *Paul v. Virginia*,³ Justice Field, delivering the opinion of the Supreme Court of the United States, said: "A grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely on the comity of those States."

In an earlier case the same court said: "Every power which a corporation exercises in another State depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty, unless a case should be presented in which the right claimed by the corporation should appear to be secured by the Constitution of the United States."⁴

¹ Story on Conflict of Laws, § 7; Sedgwick on Constitutional and Statute Law, 69.

² *Supra*, § 982.

³ *Paul v. Virginia*, 8 Wall. 181.

⁴ *Runyan v. Coster's Lessee*, 14 Pet. 122, 129, 130, *per* Justice Thompson. See also *Bank of Au-*

It is equally clear that the franchises or legal rights which a State has conferred on a corporation cannot be annulled by the act of another State, or by a decree of its courts.¹

§ 960. **The Franchises conferred upon Foreign Corporations by the Law of Comity.** — It is a general rule of the common law, that corporations chartered by foreign States may carry on business and extend their operations so long as they do not depart from the charters under which they were originally formed. This rule of law is said to exist by the comity among States. In *Bank of Augusta v. Earle*,² Chief Justice Taney, delivering the opinion of the Supreme Court of the United States, said: "We think it well settled that, by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another and sue in its courts; and that the same law of comity prevails among the several sovereignties of the Union. The public and well-known and long-continued usages of trade; the general acquiescence of the States; the particular legislation of some of them as well as the legislation of Congress,—all concur in proving the truth of this proposition."² In a later case in the same court, the rule was stated by Justice Harlan as follows: "In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that the corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court."³

gusta v. Earle, 13 Pet. 588; *Land Talman*, 4 Edw. Ch. 123, 130; *So-*
Grant Ry. Co. v. Coffee County, 6 *ciety for Prop. of Gospel v. New*
Kans. 252; *Thompson v. Waters*, *Haven*, 8 Wheat. 483; *Merrick v.*
25 Mich. 221; *Baltimore, &c. R. R.* *Van Santvoord*, 34 N. Y. 208; *Vermont v. Society for Prop. of Gospel*,
Co. v. Glenn, 28 Md. 287; *Phoenix* *1 Paine (C. Ct.)*, 653.
Ins. Co. v. Commonwealth, 5 Bush
(Ky.), 68.

² 13 Pet. 519, 592.

¹ *Importing, &c. Co. of Ga. v.* ³ *Christian Union v. Yount*, 101
Locke, 50 Ala. 335; *Barclay v.* *U. S.* 356.

§ 961. Accordingly, it may be stated as a general rule of the common law, in force in each of the States of the Union, that a corporation formed under the laws of another sovereignty may carry on its business and make contracts within the State,¹ and may protect its rights in the courts of the State, either as plaintiff² or as defendant.³ It may likewise

¹ *Bank of Augusta v. Earle*, 18 Pet. 519; *Tombigbee R. R. Co. v. Kneeland*, 4 How. 16; *Frazier v. Willcox*, 4 Rob. (La.) 518, 529; *Williams v. Creswell*, 51 Miss. 817; *Hadley v. Freedman's Sav., &c. Co.*, 2 Tenn. Ch. 122; *Lathrop v. Commercial Bank*, 8 Dana, 114; *Kennebec Co. v. Augusta Ins., &c. Co.*, 6 Gray, 204; *McCluer v. Manchester, &c. R. R. Co.*, 13 Gray, 124; *New York Floating Derrick Co. v. New Jersey Oil Co.*, 8 Duer, 648; *Hoyt v. Sheldon*, 8 Bosw. 267; *Western v. Genesee Mut. Ins. Co.*, 12 N. Y. 258; *Bard v. Poole*, 12 N. Y. 495; *Hoyt v. Thompson*, 19 N. Y. 207; *Wood, &c. Mining Co. v. King*, 45 Ga. 84; *Ohio Life Ins., &c. Co. v. Merchants' Ins., &c. Co.*, 11 Humph. 22; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Baltimore, &c. R. R. Co. v. Glenn*, 28 Md. 287.

² *Dutch West India Co. v. Van Moses*, 1 Stra. 612; 2 Ld. Raym. 1532; *National Bank of St. Charles v. De Bernales*, 1 C. & P. 569; *Newby v. Von Oppen*, L. R. 7 Q. B. 298; *Bank of Augusta v. Earle*, 18 Pet. 519; *Tombigbee R. R. Co. v. Kneeland*, 4 How. 16; *Lucas v. Bank of Georgia*, 2 Stew. (Ala.) 147; *Bank of Washtenaw v. Montgomery*, 2 Scam. 427; *Guaga Iron Co. v. Dawson*, 4 Blackf. 202; *Lewis v. Bank of Kentucky*, 12 Ohio, 182; *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560; *New York Dry Dock v. Hicks*, 5 McL. 111; *New Jersey, &c. Bank v. Thorp*, 6 Cow. 46; *Silver*

Lake Bank v. North, 4 Johns. Ch. 370; *Bard v. Poole*, 12 N. Y. 495; *Mutual Benefit L. Ins. Co. v. Davis*, 12 N. Y. 569; *Direct U. S. Cable Co. v. Dominion Tel. Co.*, 84 N. Y. 153; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 867; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *British Am. Land Co. v. Ames*, 6 Mete. (Mass.) 391; *Importing, &c. Co. v. Locke*, 50 Ala. 332; *Savage Manuf. Co. v. Armstrong*, 17 Me. 84; *American Colonization Soc. v. Gartrell*, 23 Ga. 448; *Bank of Marietta v. Pindall*, 2 Rand. 473; *Freeman's Bank v. Ruckman*, 16 Gratt. 126; *Leasure v. Union Mut. L. Ins. Co.*, 91 Pa. St. 491. Compare *Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 88. See *United States v. Insurance Companies*, 22 Wall. 99; *Insurance Co. v. The C. D., Jr.*, 1 Woods, 72.

A corporation chartered by a State to administer the estate of a deceased person may sue in another State upon notes and bills of exchange of which it has become possessed as administrator in the State in which it was incorporated, although it would not be entitled to take out letters of administration in the State where the suit is brought. Such suit could be maintained by the corporation as assignee of the notes and bills. See *Fidelity Insurance, &c. Co. v. Niven*, 5 Houst. (Del.) 416.

³ See *infra*, § 977.

acquire real and personal property by will or by gift,¹ or by purchase at a private² or a judicial sale;³ and it may take and foreclose a mortgage.⁴

§ 962. *The Law of Comity is part of the Common Law.* — This law of comity among the States is merely the common law of each State, and as such it is obligatory upon the courts. In *Bank of Augusta v. Earle*, Chief Justice Taney used the following language: "It is truly said in *Story's Conflict of Laws*, 86, 87, that, 'In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered, and ascertained in the same way and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.'"⁵

§ 963. *Departure from a Company's Charter not authorized.* — A corporation has no right to engage in transactions in a foreign State, if this would involve a departure from the charter under which the company was formed. Such transactions would be subject to all the objections which apply to unauthorized acts performed by a corporation in the State which

¹ *American Bible Soc. v. Marshall*, 15 Ohio St. 537; *Thompson v. Swoope*, 24 Pa. St. 480; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166; *Sherwood v. American Bible Soc.*, 4 Abb. App. Cas. 227; *White v. Howard*, 38 Conn. 342.

² *Runyan v. Coster's Lessee*, 14 Pet. 130; *Cowall v. Springs Co.*, 100 U. S. 55; *Christian Union v. Yount*, 101 U. S. 352; *New York Dry Dock v. Hicks*, 5 McL. 111; *State v. Boston, &c. R. R. Co.*, 25 Vt. 433; *Claremont Bridge Co. v. Royce*, 42 Vt. 736; *Thompson v. Waters*, 25 Mich. 232; *Cincinnati, &c. R. R. Co. v. Pearce*, 28 Ind. 502; *Northern Transportation Co. v. Chicago*, 7 Bias. 45; *New Hampshire Land*

Co. v. Tilton, 19 Fed. Rep. 73; *Columbus Buggy Co. v. Graves*, 108 Ill. 459.

³ *Elston v. Piggott*, 94 Ind. 14; *Lumbard v. Aldrich*, 8 N. H. 31.

⁴ *Lathrop v. Commercial Bank*, 8 Dana, 114; *New York Dry Dock v. Hicks*, 5 McL. 111; *Farmers' L. & T. Co. v. McKinney*, 6 McL. 1; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Leasure v. Union Mutual Life Ins. Co.*, 91 Pa. St. 491; *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322.

⁵ *Bank of Augusta v. Earle*, 13 Pet. 589; *Thompson v. Waters*, 25 Mich. 224, *per* Christiancy, C. J.; *Curtis v. McCullough*, 3 Nev. 218, 219.

granted its charter; and in addition to this, such transactions would involve an unauthorized assumption of corporate power in the State where they were consummated. Chief Justice Taney said: "It may be safely assumed that a corporation can make no contracts, and do no acts, either within or without the State which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner, as the charter authorizes. And if the law creating the corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the State, all contracts made by it in other States would be void. . . . The corporation must, no doubt, show that the law of its creation gave it authority to make such contracts, through such agents. Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied."¹

The power of an agent of a corporation to bind it by an act performed in a foreign State depends upon the terms of the charter to which the shareholders have agreed. The legality of the act depends upon the laws in force where the act is performed.² The enforceability of the act by legal proceedings depends upon the comity of the State where suit is brought. Whether the performance of the act is a departure from the chartered purposes of the corporation giving the State a right to annul the company's franchises depends upon the laws of the State by which the franchises were granted.

¹ *Bank of Augusta v. Earle*, 13 Pet. 588, 589; *Bank of Washtenaw v. Montgomery*, 2 Scam. 427; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Ohio Life Ins., &c. Co. v. Merchants' Ins., &c. Co.*, 11 Humph. 24; *Aspinwall v. Ohio, &c. R. R. Co.*, 20 Ind. 492; *Thompson v. Waters*, 25 Mich. 222; *Diamond Match Co. v. Powers*, 51 Mich. 145; *Pierce v. Crompton*, 13 R. I. 812; *Bard v. Poole*, 12 N. Y. 505. Compare *Milnor v. New York, &c. R. R. Co.*, 53 N. Y. 363.

² *Ellsworth v. St. Louis, &c. R. R. Co.*, 98 N. Y. 558.

§ 964. Foreign Corporations are subject to the General Laws.

— A corporation has no implied authority to do any act in a foreign State which is not permitted by the laws of the latter to individuals generally. The law of comity merely enables a body of corporators chartered by one State to act in a corporate capacity in another State, subject to all the laws and regulations of the latter.¹

Thus, devises to corporations are forbidden by the testamentary law of New York, except under certain conditions; and it has been decided that a devise made in New York to a foreign corporation would be void, although the corporation was authorized by its charter to receive the devise.² For the same reason, it has been held that, although a corporation be expressly authorized by its charter to charge a certain rate of interest upon its loans, it will nevertheless not be permitted to charge the same rate in a foreign State, if that would be contrary to the usury laws there in force.³

§ 965. Comity refused when contrary to the Policy of the State. — It is not necessary, in all cases, that a State should by statute expressly exclude foreign corporations in order to indicate that they shall not be allowed to act within its jurisdiction; the will of the State may be implied from its general policy and legislation. Chief Justice Taney said: "Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made."⁴

¹ *Milnor v. New York, &c. R. R. Co.*, 53 N. Y. 363; *Bard v. Poole*, 12 N. Y. 505; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *McGregor v. Erie Ry. Co.*, 35 N. J. Law, 115; *Bank of Augusta v. Earle*, 13 Pet. 539, 595; *Stetson v. City Bank*, 2 Ohio St. 174; *Lewis v. Bank of Kentucky*, 12 Ohio, 132.

² *White v. Howard*, 46 N. Y. 144, 165; *United States v. Fox*, 94 U. S. 315; *Boyce v. City of St. Louis*, 29 Barb. 650.

³ *Hitchcock v. United States Bank*, 7 Ala. 485. Compare *Larwell v. Hanover Savings, &c. Soc.*, 40 Ohio St. 274, 281.

⁴ *Bank of Augusta v. Earle*, 13 Pet. 592; *Myers v. Manhattan Bank*, 20 Ohio, 301, 302; *Runyan v. Coaster's Lessee*, 14 Pet. 122, 130; *Bank of Marietta v. Pindall*, 2 Rand. 478; *Rees v. Conococheague Bank*, 5 Rand. 326; *Carroll v. City of East St. Louis*, 67 Ill. 568; *Starkweather v. American Bible Soc.*, 72 Ill. 50;

Accordingly, it has been held that foreign corporations have no right by the law of comity to do acts within a State which are prohibited by the laws of that State to its own citizens or corporations engaged in a similar business.¹

§ 965 a. By the common law, the right of forming corporations and acting in a corporate capacity is not accorded freely and without conditions to every one, but must be derived from an act of the legislature. Even where the right of forming corporations is extended to all persons by general statutes, the right is invariably limited by provisions designed to regulate the companies in their relations to the public, and to secure publicity of the terms of their organization. It must be assumed that this restriction of the right of forming corporations and acting in a corporate capacity is based upon reasons of public policy; and so long as this restriction is upheld by the laws, its effect cannot be nullified by an extension of comity towards other States and countries.

The law of comity by which the corporations of a foreign State are recognized and permitted to transact their affairs is founded on reasons of convenience. Its purpose is to enable each State to charter corporations for legitimate objects, with the power to extend their dealings into other States, in the same manner as individuals engaged in a similar trade or enterprise. But it was not established for the purpose of giving any State an unlimited power to dispose of the franchise of acting in a corporate capacity in other States. To obtain a charter for the purpose of evading the laws of a foreign State, under cover of the rule of comity, would be a fraud upon the State granting the charter; and to attempt to act under such charter in the foreign State would be a fraud upon the latter.

Accordingly, it has been decided that a corporation chartered by the State of Pennsylvania, with authority to transact its business and locate its offices anywhere, *except* in the

United States Trust Co. v. Lee, 78 Ill. 144; United States Mortgage Co. v. Gross, 98 Ill. 483, 493. Compare Christian Union v. Yount, 101 U. S. 358. ¹ People v. Howard, 50 Mich. 289; United States Mortgage Co. v. Gross, 98 Ill. 483, 493; and cases in the preceding note.

State of Pennsylvania, would not be allowed by the comity of the State of Kansas to transact its business in that State.¹

However, while this doctrine is correct in principle, its application requires much caution. The fact that all the operations of a corporation are carried on outside of the State in which it was incorporated is not necessarily an objection to the legality of these operations. It is only if some rule of law or principle of policy adopted by a State would be interfered with by allowing a foreign corporation to transact business within its jurisdiction, that the usual comity will be refused.²

§ 966. *Repeal of the Law of Comity not implied.* — The law of comity is the law of the land, unless expressly or impliedly repealed; and courts cannot refuse to recognize and enforce this law, if the State has indicated no intention to repeal it. Justice Field, delivering the opinion of the Supreme Court of the United States, said: "If the policy of a State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corpora-

¹ *Land Grant Ry., &c. Co. v. Coffee County*, 6 Kans. 254. Valentine, J., said: "No rule of comity will allow one State to spawn corporations, and send them forth into other States to be nurtured and to do business there, when said first-mentioned State will not allow them to do business within its own boundaries. . . . Is the State of Kansas bound by any kind of courtesy, or comity, or friendship, or kindness to Pennsylvania to treat this corporation better than its creator (the State of Pennsylvania) has done? It can hardly be supposed so, when we come to consider how carefully our own constitution has guarded the creation of corporations

in our own State." Compare *State v. Milwaukee, &c. Ry. Co.*, 45 Wis. 579; *Runyan v. Coster's Lessee*, 14 Pet. 180; *Second Nat. Bank v. Lovell*, 2 Cin. (Ohio) 400; *Hanna v. International Petroleum Co.*, 23 Ohio St. 622; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 352; *Hill v. Beach*, 12 N. J. Eq. 81; *Smith v. Alvord*, 68 Barb. 423; *Merrick v. Van Santvoord*, 34 N. Y. 222; *Merrick v. Brainard*, 38 Barb. 574.

² See *Second Nat. Bank v. Lovell*, 2 Cin. 401; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 352; *Hanna v. International Petroleum Co.*, 23 Ohio St. 622; and see the next section.

tions, or allows corporations to be formed only by general law."¹

§ 967. **The Charter Contract alone is recognized.**— It is the charter alone which is recognized by the law of comity, and not the general legislation of the State in which the corporation was formed. The word "charter" is here used to signify the agreement between the shareholders of the corporation, whether this agreement be contained in a special act of the legislature, or in articles of association, or in either of these taken in connection with certain general laws of the State.

The law of comity merely enables the corporators to exercise the franchise of acting in a corporate capacity in foreign States; and the extent of this franchise is determined by the agreement entered into when the charter was accepted. The laws of the State where the corporation was formed by the agreement of the corporators, are regarded only so far as they determine the scope and validity of this agreement itself. The same rule would apply to a general or limited partnership formed by agreement in one State for the purpose of carrying on business in other States.

The general laws and regulations of a State are intended to govern only within the limits of the State enacting them, and the State would have no power to give them extra-territorial force. Such provisions do not, as a rule, enter into contracts made within the State, if they are to be performed in another jurisdiction. In many instances it is lawful to enter into a contract to perform an act in a foreign State, if authorized by the laws of the latter, although the same act could not be lawfully performed in the State where the contract was made. It follows, therefore, that if a statute enacted by a State— whether as a general law, or as a special provision in the charter of a corporation— was enacted for the enforcement of a local policy only, it will not be pre-

¹ *Cowell v. Springs Co.*, 100 U. S. 59, 60, quoted with approval by Mr. Justice Harlan in *Christian Union v. Yount*, 101 U. S. 356; *Stevens v. Pratt*, 101 Ill. 206; *Thompson v. Waters*, 25 Mich. 224; *Bank of Augusta v. Earle*, 13 Pet. 594-597; *Merrick v. Van Santvoord*, 84 N. Y. 221.

sumed that such statutory provision was intended by the State, or by the shareholders forming the corporation, to enter into the charter contract, and to regulate the company in its transactions outside of the State; and such enactment will, therefore, not affect the validity of the dealings of the company in foreign States.¹

And even though the charter of a corporation, or a general law entering into the charter contract, expressly prohibit the company from doing a certain act, in the State or out of the State, such prohibition can have no extra-territorial force, and the performance of the prohibited act in a foreign State will not be illegal by force of the prohibition. It will merely be contrary to the general common law which prohibits a corporation from doing any act in excess of its charter. Accordingly, in *Ellsworth v. St. Louis, &c. Railroad Company*,² the Court of Appeals of New York held that a provision in a charter of incorporation enacted by the State of Illinois, prohibiting the corporation from disposing of its bonds at less than "eighty cents on the dollar," would not apply as a statutory prohibition to a sale made in the State of New York. Rapallo, J., delivering the opinion, said: "There is nothing in the laws of New York which renders the contract illegal, and even if the charter of the defendant (which was granted under the statutes of the States of Illinois and Indiana) should be so construed as to contain prohibitions which would have rendered the contract illegal in those States, if made there, they do not have that effect in this State. They have no effect here, except as restrictions upon the power of the corporation or its officers."

§ 968. Upon the same principle, it has been held that, although devises to corporations are forbidden by the Statute

¹ See cases cited in the next section.

If the laws of the State under which a corporation was formed provide that any corporation of the State may borrow "at any rate of interest not exceeding that for which natural persons are or may

be allowed to stipulate under the laws of the State," the company may borrow outside of the State at such rates as are lawful where the loan is made. *Larwell v. Hanover Savings, &c. Soc.*, 40 Ohio St. 274, 281.

² 98 N. Y. 558.

of Wills in the State of New York, this does not prevent a corporation chartered by the State of New York from taking by devise in Connecticut.¹ A devise made in Massachusetts to a New York corporation, which by the law of New York could not receive the devise, was sustained, for the reason that the devise was not prohibited by the laws of Massachusetts, and, being a charity, could be held in abeyance until the legislature of New York had passed an act enabling the corporation to take.²

A law of the State of New Jersey, declaring that a transfer of property made by an insolvent corporation shall be null and void, does not affect a transfer of property made by a New Jersey corporation within the State of New York;³ and it has been held that a banking corporation, prohibited by its charter from charging more than six per cent interest on its loans and discounts, might charge a higher rate of interest in foreign States, if allowed by the laws there in force.⁴

Upon this principle, it has also been held that a corporation chartered by the State of New York, for the purpose of operating a railroad in a foreign State, would not be liable for the death of a person in such foreign State, by virtue of a statute of New York giving the representatives of persons

¹ *White v. Howard*, 88 Conn. 842, 861. Foster, J., said: "There is no prohibition in the charter; the inability is created by the New York Statute of Wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York Statute of Wills, and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take created by the statute of a State which is local, and a prohibitory clause in a charter, which everywhere cleaves to the corporation."

² *Fellows v. Miner*, 119 Mass. 541. Compare *Baker v. Clarke Institution*, 110 Mass. 88; *Ould v. Washington Hospital*, 95 U. S. 813.

³ *Hoyt v. Shelden*, 3 Bosw. 267, 299. See also *Hoyt v. Thompson*, 5 N. Y. 320, 353; s. c. 19 N. Y. 208; *Ohio Life Ins., &c. Co. v. Merchants' Ins., &c. Co.*, 11 Humph. 24; and compare *Chafee v. Fourth Nat. Bank*, 71 Me. 514.

⁴ *Hitchcock v. United States Bank*, 7 Ala. 386, 433; *Bard v. Poole*, 12 N. Y. 495. See *Miller v. Tiffany*, 1 Wall. 310; *Depau v. Humphreys*, 20 Mart. (La.) 1; *Bullard v. Thompson*, 35 Tex. 313.

killed through negligence of others a cause of action. The statute of New York constituting such killing an actionable tort has no extra-territorial force; nor was it intended as a part of the charter of the company to be operative in foreign States.¹

§ 969. *Only the Franchise of acting in a Corporate Capacity extended by Comity.* — A corporation is permitted by comity to enjoy the franchise of acting in a corporate capacity in a foreign State; but this comity seems never to have been extended to any of the extraordinary franchises which are sometimes conferred upon corporations, such as the right to condemn property, or to enjoy a monopoly or an exemption from taxation.² But the legislature of a State may by statute confer these special franchises upon foreign corporations, as well as upon corporations formed within the State.³

§ 970. *Corporations not entitled under the Constitution to Rights and Immunities as Citizens.* — There is nothing in the Constitution of the United States limiting the power of the several States to repeal the common law rule of comity, by which foreign corporations are recognized and permitted to act in a corporate capacity.

It has been argued that foreign corporations are citizens within the meaning of the constitutional provision, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. But it is evident that corporations are not *in reality* citizens;⁴ nor are their shareholders necessarily citizens; and it is not probable that the framers of the Constitution intended to include corporations under the term "citizens," inasmuch as they would thereby have conferred upon each State the power of disposing of the franchise of acting in a corporate capacity within the jurisdiction of the other States, — a power which cer-

¹ *Crowley v. Panama R. R. Co.*, 30 Barb. 99. *lington, &c. R. R. Co.*, 1 McCrary, 452; *Dodge v. Council Bluffs*, 57

² *State v. Boston, &c. R. R. Co.*, 25 Vt. 438, 442; *Middle Bridge Co. v. Marks*, 26 Me. 326. *Iowa*, 560. Compare *Holbert v. St. Louis, &c. R. R. Co.*, 45 Iowa, 26.

⁴ *Supra*, § 1.

³ *Union Pacific Ry. Co. v. Bur-*

tainly did not exist before the Constitution was adopted. Nor would it be easy to determine exactly what the rights and immunities of a corporation-citizen are.

It is an entirely different question whether a State can pass a law discriminating against certain corporations on account of the citizenship of their individual members. But a law discriminating against corporations *chartered* by a sister State would not be a discrimination against the individual citizens of such State. It would merely be a limitation upon the extra-territorial effect allowed by comity to charters of incorporation passed by another State; and the application of such law would in no case be determined by the citizenship of the members of the company.

In *Paul v. Virginia*,¹ Justice Field said: "The privileges and immunities secured to citizens of each State in the several States by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States."

§ 971. **A State may exclude Foreign Corporations.**—It has been decided, in accordance with this view, that a State may wholly exclude from its territory corporations chartered by other States; and the motive of such exclusion cannot be inquired into.² A State may also require foreign corporations to comply with certain prescribed formalities, to pay taxes, and to assume obligations, as a condition precedent to their right of transacting business within the jurisdiction of the State;³ and contracts entered into by such companies

¹ *Paul v. Virginia*, 8 Wall. 180; Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; s. c. 48 Ill. 172; *People v. Fire Association*, 92 N. Y. 811; following notes.

² *Doyle v. Continental Ins. Co.*, 62 U. S. 535; *Blair v. Perpetual Ins. Co.*, 10 Mo. 564. *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush (Ky.), 68; *State*

³ *Lafayette Ins. Co. v. French*, 18 How. 407; *Paul v. Virginia*, 8 Wall. 180; *Western Union Tel. Co. v. Mayer*, 28

within the State, before the prescribed conditions have been complied with, may be declared null and void.¹

A State law providing that no insurance company chartered by any other State of the Union shall transact business within the State, until it shall have filed a stipulation not to remove suits brought against it in the State courts into the courts of the United States, and that, if any such company should remove a suit into the United States courts, in violation of its agreement, its license to do business within the State should be revoked, is not unconstitutional.² But an agreement of this character cannot be specifically enforced, nor can it be pleaded as a bar to a petition for a removal.³

§ 972. *Constitutional Rights of Foreign Corporations.* — There are, however, certain constitutional rights which may be claimed by every association, whether it be incorporated in a foreign State or not. These rights belong to incorporated associations independently of their mere *franchise* or *privilege* of acting in a corporate capacity. The latter may, indeed, be absolutely refused to a corporation outside of the State by which it was chartered; but rights which are guaranteed by the Constitution of the United States must be respected by every State of the Union, as a matter of duty, and not merely of comity.

Thus, a State cannot impair the contracts of a foreign corporation, or deprive it of its property without "due process of law," although it may have prohibited the corporation from acting within the State. It is likewise clear, that a tax constituting a forbidden interference with commerce is equally unconstitutional, whether imposed upon a domestic

Ohio St. 539, 540; Home Ins. Co. v. Davis, 29 Mich. 288; Slaughter v. Commonwealth, 18 Gratt. 767; Tatem v. Wright, 8 Zab. 429; Fire Department v. Noble, 3 E. D. Smith, 449. ¹ Insurance Co. v. Morse, 20 Wall. 445. *Contra*, Home Ins. Co. v. Davis, 29 Mich. 288.

² See *supra*, § 661 *et seq.*
³ Doyle v. Continental Ins. Co., 94 U. S. 537, overruling the Circuit Court, Hartford Fire Ins. Co. v. Doyle, 6 Biss. 461. Upon common law principles, an agreement not to sue in a court does not oust its jurisdiction, or bar an action brought in violation of the agreement. Scott v. Avery, 5 H. L. C. 811; Insurance Co. v. Morse, *supra*.

or a foreign corporation. This was decided by the Court of Errors of New Jersey in *Erie Railway Company v. The State*.¹ Chief Justice Beasley said: "It seems to be utterly inconsistent with legal principles, which have always been deemed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence for the purpose of depriving it of those rights which belong to every individual or company known to the law. Such a doctrine would obviously offer the entire property of foreign corporations as a prize to the rapacity of any State in whose territories it might be, or over which it might happen to be carried. It is readily to be admitted, that a law imposing certain terms upon all foreign corporations as conditions precedent to their acquisition in this State of the right to act in the unity of their corporate existence, would be legal. Such a law would prevent foreign persons from doing any legal act in this State as a corporation; but can it be maintained that such law would have the further effect of leaving the property of the company as a spoil of the first taker? A statute that should abolish the rule of comity and should refuse a recognition of foreign corporations would, it is conceived, have this effect and no more, i. e. to convert corporators, as to the State enacting the supposed law, into a partnership of individuals; and thus, although the corporation as such could not, by suit or otherwise, assert its right to protect its own property, the members of the company would be under no such disability."

§ 978. The limits of the constitutional powers of a State over a corporation formed in another State can best be determined by regarding the corporation in its true light, as an association of individuals rather than as a fictitious person or entity. The corporate association is clearly not in fact or in law a citizen of the State by which it is chartered, and therefore is not entitled to rights accorded by the Constitution to the "citizens" of the State. The individual shareholders or members of a corporation are undoubtedly "citizens," and

¹ *Erie Ry. Co. v. State*, 31 N. J. *Indiana v. American Express Co.*, Law, 531, 543. See also *State of 7 Biss.* 230.

are entitled to the rights and immunities of "citizens"; but it results from the character of the corporate or collective rights of the shareholders or members, that their individual citizenship may, as a rule, be disregarded in considering these rights. For some purposes, the shareholders or members of a corporation must all be regarded as citizens of the State by which the corporation was chartered.¹

However, most of the constitutional limitations upon the powers of the States are imposed for the benefit of all persons throughout the United States, irrespective of citizenship. The shareholders of a corporation are, therefore, entitled to the benefit of these provisions, without regard to their citizenship or the jurisdiction in which their association was formed. A State law impairing a contract of a corporation, or taking away its property without due process of law, would impair the constitutional rights of the persons constituting the corporation, whether the association was formed in the State passing the law or in another State. The same rule would apply though the corporation was formed without authority of law, and had no legal right to make a contract or hold property within the State.² The collective or corporate rights of the shareholders in a corporation can be most easily adjusted and enforced by treating the association as an entity, in which all the corporate rights are vested on behalf of its members. But the shareholders are entitled to the protection of these rights from unconstitutional legislation, whether their association be recognized as a corporation under the laws of the State, or not.

§ 974. **What Laws affecting Corporations interfere with Commerce.**—The members of an association, whatever be its nature and wherever it may have been formed, are entitled to object to the enforcement of any State law which is an

¹ *Infra*, § 975.

² A State may, however, prohibit foreign corporations from making contracts or from holding property within its limits, and may impose penalties for any unauthorized exer-

cise of corporate powers within its jurisdiction by a foreign or domestic corporation; and it may, by a law having prospective operation, render legally void any prohibited contract or acquisition of property.

unconstitutional interference with commerce, if their rights would be affected by such law. And if the association is a corporation, the rights of the shareholders will usually be protected through the corporate agents and in the corporate name.

In *Paul v. Virginia*,¹ the Supreme Court decided that legislation of a State discriminating against all foreign insurance companies, and making their right to transact business within the State depend upon the payment of a license tax, was not an interference with the power of regulating commerce, delegated by the States to Congress. The decision of the court was based upon the ground that issuing a policy of insurance is not a transaction of commerce, within the meaning of the Constitution. But a sufficient ground would have been that the right of acting in a corporate capacity within a State is not a right given by the Constitution, either to the citizens of the State itself, or of other States or countries. The common law prohibits all persons within a State from acting in a corporate capacity, unless authorized by the legislature of the State or incorporated in another State; and the right extended to foreign corporations by comity may be withdrawn.² If the right of acting in a corporate capacity were necessary as a means of carrying on any particular branch of commerce between the States or with foreign countries, the right would undoubtedly be secured by the Constitution. This is probably true of railroad companies, because it would be practically impossible to establish and maintain a line of railroad of any considerable length except through a corporate organization. To prohibit a railroad company from acting in a corporate capacity outside of the State in which it was formed, would often be a serious interference with commerce.

But even if a State were bound to accord to a company the right of acting in a corporate capacity within its limits, the State would undoubtedly retain the power of making reason-

¹ *Paul v. Virginia*, 8 Wall. 168, Compare *Cooper Manuf. Co. v. Ferguson*, 118 U. S. 727.
183; *Ducat v. Chicago*, 10 Wall. 410; 48 Ill. 172; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

² *Supra*, § 971.

able regulations for the government of the company, and prescribing conditions to be complied with before the right may be claimed. Thus, if a State should require foreign corporations to reincorporate themselves, pursuant to the general laws of the State, or to file their charters and obtain a license, or to appoint resident agents, this would not be a prohibited interference with commerce, though a total exclusion might be unconstitutional.¹

§ 974 a. **Telegraph Companies.** — It is clear that telegraph lines are instruments of commerce, and that telegraph companies are subject to the regulating power of Congress in respect of their foreign and inter-state business. A State law taxing messages sent by a telegraph company to points in another State or in a foreign country is therefore unconstitutional.²

The act of Congress of July 24, 1866, provides that any telegraph company organized under the laws of any State shall have the right to construct, maintain, and operate its lines of telegraph over any portion of the public domain, over any military or post road of the United States, and across the navigable streams of the United States, upon filing with the Postmaster-General its written acceptance of the restrictions and obligations prescribed by the act.³ By filing the prescribed acceptance, a telegraph corporation becomes a Federal agency, and cannot be prevented by any State from enjoying the privileges conferred by the act within its territory.⁴

¹ In *Stout v. Sioux City, &c. R. R. Co.*, 8 Fed. Rep. 794, 799, McCrary, J., said: "It is the right of each State in which a corporation transacts business to require it to become a corporation under and by virtue of its own laws." Compare *Moore v. Chicago, &c. Ry. Co.*, 21 Fed. Rep. 817; *Insurance Co. v. Morse*, 20 Wall. 445; and see *infra*, § 991 *et seq.*

² *Telegraph Co. v. Texas*, 105 U. S. 460.

³ U. S. Rev. Stat., §§ 5263-5268.

⁴ *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26.

It has been held in Indiana, that a statute of that State regulating all foreign corporations doing business within the State could not be applied to a foreign corporation holding letters patent of the United States, in regard to any transactions of the company connected

§ 975. **Citizenship of Corporations with Regard to the Jurisdiction of Federal Courts.** — The jurisdiction conferred upon the Federal courts by act of Congress under the Constitution extends to "controversies between citizens of different States." In *Bank of the United States v. Deveaux*,¹ the Supreme Court decided that a corporation was not a citizen within the meaning of this provision. But in the same case it was also held that, if the citizenship of all the shareholders composing a corporation were different from that of the opposing party, they would be entitled to sue jointly in the Federal courts; and that in such case the right to sue in a *corporate* capacity would be accorded them as a matter of comity.²

In subsequent cases, the Supreme Court has held that, for the purpose of determining the jurisdiction of the Federal courts in suits by or against corporations, all the shareholders must be conclusively presumed to have been created citizens of the State by whose laws they were incorporated. Practically, therefore, a corporation is treated as a citizen of the State from which its franchises are derived, in giving effect to the laws by which the jurisdiction of the Federal courts is determined.³

with the manufacture, use, or sale of the invention secured by the letters patent. *Grover & Baker Sewing Machine Co. v. Butler*, 53 Ind. 454.

¹ *Bank of United States v. Deveaux*, 5 Cranch, 61.

² 5 Cranch, 91; *Bank of Augusta v. Earle*, 13 Pet. 586.

³ In *Muller v. Dows*, 94 U. S. 445, Justice Strong said: "A corporation itself can be a citizen of no State in the sense in which the word 'citizen' is used in the Constitution of the United States. A suit may be brought in the Federal courts by or against a corporation, but in such case it is regarded as a suit brought by or against the

stockholders of the corporation; and for the purpose of jurisdiction it is conclusively presumed that all the stockholders are citizens of the State which, by its laws, created the corporation. It is therefore necessary that it be made to appear that the artificial being was brought into existence by the law of some State other than that of which the adverse party is a citizen." *Railway Co. v. Whitton*, 13 Wall. 283. See also *Louisville, &c. R. R. Co. v. Letson*, 2 How. 514; *Marshall v. Baltimore, &c. R. R. Co.*, 16 How. 314; *Lafayette Ins. Co. v. French*, 18 How. 404; *Covington Draw Bridge Co. v. Shepherd*, 20 How. 227; *Ohio, &c. R. R. Co. v. Wheeler*, 1 Black,

The same rule applies to a corporation chartered by a foreign State or country. The members of such a corporation are conclusively presumed to be citizens or subjects of the State or country in which the corporation was formed, and the corporation itself may therefore be practically treated as a citizen or subject of such country or State, in determining the jurisdiction of the Federal courts.¹

§ 975 *a*. Where the jurisdiction of the Circuit Court of the United States depends upon the citizenship of the parties, the defendant can put in issue the allegations of citizenship made by the plaintiff only by a plea in abatement; under the general issue, evidence showing that the parties are not citizens of different States is inadmissible. This rule applies to both corporations and individuals.² It should be observed, however, that it has been provided by act of Congress that, "if in any suit commenced in a Circuit Court, or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, . . . said Circuit Court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require."³

§ 976. *Suits against Foreign Corporations.* — In order to determine whether a corporation is bound by legal proceedings brought against it in a foreign State, two distinct questions must be considered. These are: —

297; *Paul v. Virginia*, 8 Wall. 177. *Graves*, 14 How. 506; *Wickliffe v. 178; Insurance Co. v. Francis*, 11 Owings, 17 How. 47; *Smith v. Kernochen*, 7 How. 198. See *Gilmer v. City of Grand Rapids*, 16 Fed. Rep. 708.

¹ *Steamship Company v. Tugman*, 106 U. S. 118.

² *Blackburn v. Selma, &c. R. R. Co.*, 2 Flipp. 525; *De Sobry v. Nicholson*, 8 Wall. 386; *Wythe v. Myers*, 8 Sawy. 595; *Jones v. League*, 18 How. 76; *Sheppard v.*

³ Act of March 3, 1875, § 5. U. S. Rev. Sta. § 639 c. See *Rae v. Grand Trunk Ry. Co.*, 14 Fed. Rep. 401; *Draper v. Town of Springfield*, 15 Fed. Rep. 328.

First. Do the laws of such foreign State authorize the corporation to be sued there?

Secondly. Is the corporation subject to the jurisdiction of the court in which the suit is brought?

It has always been held that aliens or the residents of another State may be sued, provided jurisdiction can be obtained over their persons; and there is no good reason why the same rule should not be applied to corporations. In order that a corporation may be sued outside of the State by which it was chartered, it is indeed necessary that the franchise or corporate capacity conferred upon the corporators by the laws of such foreign State be recognized for the purposes of the suit. But inasmuch as the right of suing as complainant is accorded to foreign corporations as a matter of comity, and for the benefit of the shareholders,¹ it is only reasonable that their corporate capacity should be recognized also for the purpose of giving justice to the citizens of the State where the corporation is made defendant.

A judicial determination, by its very nature, imports that both the parties have had a hearing or a chance to be heard; and an arbitrary decree passed against a person without a hearing, or a proper citation to appear, is not entitled to respect in any civilized country.² The same is obviously true in case of corporations. And it is therefore essential to the validity of a judgment rendered against a corporation in a foreign State, that the corporation shall have actually appeared in the suit, or shall have been cited to appear in some recognized manner, so as to become chargeable with the consequences of its neglect.³

§ 977. *Foreign Corporations may be sued at Common Law.* — A corporation chartered by a foreign State may be sued in any State where the common law is in force, provided the necessary jurisdiction can be obtained over its person, by service of process or by voluntary appearance. In the Supreme Court of New Hampshire, Wilcox, J., said: "If, upon prin-

¹ *Infra*, § 961.

² *St. Clair v. Cox*, 106 U. S.

³ *Windsor v. McVeigh*, 93 U. S. 350.

ciples of law or comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognize their existence for one purpose, we must also for the other. If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities, and do not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here. There may be difficulties in procuring legal service of a writ upon a foreign corporation; and so, in case of an individual residing in a foreign jurisdiction, it may be difficult or impossible to procure such service of process upon him as to subject him to the jurisdiction of our courts. But in either case, when the service can be made, or when the person of the corporation appears and submits to our jurisdiction, we see no objection to the authority of the court to proceed."¹ The Supreme Court might properly have added, that so reasonable and so obvious a rule ought never to have been considered doubtful, or called in question.

§ 978. Validity of Judgments against Foreign Corporations. —
The legal effect accorded by the common law to a judgment

¹ *Libbey v. Hodgdon*, 9 N. H. 396; *v. Michigan Cent. R. R. Co.*, 99 Newby *v. Von Oppen*, L. R. 7 Q. B. 293; *Lafayette Ins. Co. v. French*, 18 How. 407; *Eby v. Northern Pacific R. R. Co.*, 13 Phila. 144; *North Missouri R. R. Co. v. Akers*, 4 Kans. 458; *City Fire Ins. Co. v. Carugi*, 41 Ga. 670; *Bushel v. Commonwealth Ins. Co.*, 15 S. & R. 176; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 416, 441. Compare *Smith v. Mutual Life Ins. Co.*, 14 Allen, 386. *Mass. 534*; *National Bank v. Huntington*, 129 Mass. 444; *Peckham v. Haverhill Parish*, 16 Pick. 274, 286; *Hayden v. Androscooggin Mills*, 1 Fed. Rep. 93; *Myers v. Dorr*, 13 Blatchf. 22; *Boston Electric Co. v. Electric Gas Lighting Co.*, 23 Fed. Rep. 838.

That a corporation may voluntarily appear by attorney, see *Atty.-Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272; *Murray v. Vanderbilt*, 39 Barb. 140.

As to the rule in Massachusetts, see *Desper v. Continental Water Meter Co.*, 137 Mass. 252; *Andrews*

A foreign corporation may be garnishee in an execution attachment. *Barr v. King*, 96 Pa. St. 485.

But shares in a foreign corporation cannot be attached, under the laws of New York, if the certificates are not in the control of the corporation. *Plimpton v. Bigelow*, 98 N. Y. 592, reversing s. c. 12 Abb. N. C. 202; 11 Abb. N. C. 180.

obtained against a foreign corporation is the same as in case of a judgment obtained against an individual under similar circumstances. If the court rendering the judgment had jurisdiction over the person of the corporation, either through service of process or through voluntary appearance, its judgment will be as obligatory, in every respect, as if the corporation had been resident within the State. Under the Constitution of the United States, a judgment thus obtained against a foreign corporation in any one State is entitled to the same faith and credit in every State throughout the Union.¹

But, unless jurisdiction is obtained over the person of a foreign corporation, no valid personal judgment can be rendered; and the suit can be sustained only as a proceeding *in rem* by actual attachment of property of the corporation situated within the limits of the State; in such a proceeding, no valid judgment can be rendered against the corporation except in respect to the property attached.²

§ 979. **Service of Process on Corporations.** — It is obviously impracticable to make service of a writ upon a corporation

¹ *Lafayette Ins. Co. v. French*, 18 How. 404, 407; and see generally the cases cited in the following sections.

² *Warren Manuf. Co. v. Ætna Ins. Co.*, 2 Paine (U. S. C. Ct.), 501, 511, 516; *Latimer v. Union Pacific Ry. Co.*, 43 Mo. 105; *Barnett v. Chicago, &c. R. R. Co.*, 4 Hun, 114; *Bushel v. Commonwealth Ins. Co.*, 15 S. & R. 176. See *Pennoyer v. Neff*, 95 U. S. 714.

In *St. Clair v. Cox*, 106 U. S. 350, 359, Justice Field said: "When service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application for the writ or accompanying its

service, or in the pleadings or the finding of the court — that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

aggregate directly. For this reason, it is one of the implied conditions in the creation of every corporation aggregate, that its managing agents shall be invested with authority to receive service of process directed against the corporation; and hence service upon the proper officer will constitute a valid service upon the corporation itself. Mr. Justice Blackburn said: "At common law the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer so as to secure that it came to the knowledge of the corporation, and then proceeding by distress. The clerk or officer must be in the nature of a head officer, whose knowledge would be that of the corporation."¹

However, the method of serving corporations with process is generally regulated by statute in the several States. It is usually provided that, if process directed against a corporation is served upon certain specified agents of the company, it shall be valid as service upon the company itself.²

§ 980. **Service of Process upon Foreign Corporations at Common Law.** — Jurisdiction may be obtained over a corporation chartered by a foreign State, either through service of process,

¹ *Newby v. Von Oppen*, L. R. 7 Upper Miss. Trans. Co. v. Whittaker, 16 Wis. 220; *Carr v. Commercial Bank*, 19 Wis. 272; *Doty v. Michigan Central R. R. Co.*, 8 Abb. Pr. 427; *Bain v. Globe Ins. Co.*, 9 How. Pr. 448; *Flynn v. Hudson River R. R. Co.*, 6 How. Pr. 308; *Bank of Commerce v. Rutland, &c. R. R. Co.*, 10 How. Pr. 1; *Donadi v. New York, &c. Ins. Co.*, 2 E. D. Smith, 519; *American Express Co. v. Johnson*, 17 Ohio St. 641. As to other officers, see *New Albany, &c. R. R. Co. v. Grooms*, 9 Ind. 243; *New Albany, &c. R. R. Co. v. Tilton*, 12 Ind. 3; *Ohio, &c. R. R. Co. v. Quier*, 16 Ind. 440; *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422.

² As to what agents are managing agents within the meaning of a statute of this description, see *Moore v. Freeman's Nat. Bank*, 92 N. Car. 590.

or by voluntary appearance of the company, by its authorized agents.¹ It is essential, in order to bind the corporation by a judgment thus obtained, that the agents upon whom the writ is served, or who enter an appearance on behalf of the corporation, shall have authority to represent it for that purpose. The particular agents of a corporation upon whom service can properly be made in the jurisdiction in which the company is resident, are not necessarily constituted its agents for the same purpose in other States. If a corporation is not engaged in trade, and makes no contracts in a foreign State, justice seems to demand that it should not be subjected to suits in that jurisdiction; and it has been held, therefore, that under these circumstances the agents of a company have no authority to represent it in receiving service of writs, or entering a voluntary appearance. Service of process upon the president or other managing agents of a corporation, while merely casually present in the jurisdiction of another State, does not constitute personal service upon the corporation itself.²

There is not the slightest reason why service of process upon a foreign corporation, at common law, should not be governed by the same principles and rules as service of process upon domestic corporations, at common law. The powers of the agents of a corporation to represent the company are not limited by State lines, but by the scope of the company's

¹ *Lafayette Ins. Co. v. French*, 18 How. 407; *North Missouri R. R. Co. v. Akers*, 4 Kans. 453; *Libbey v. Hodgdon*, 9 N. H. 394.

² *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635; *McQueen v. Middletown Manuf. Co.*, 16 Johns. 7; *Peckham v. Haverhill Parish*, 16 Pick. 286; *Newell v. Great Western Ry. Co.*, 19 Mich. 336; *Latimer v. Union Pacific Ry. Co.*, 43 Mo. 105; *Lathrop v. Union Pacific Ry. Co.*, 1 McArthur, 234; *Dallas v. Atlantic, &c., R. R. Co.*, 2 McArthur, 146; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. Law, 15; *Moulin v. Trenton, &c. Ins. Co.*, 4 Zab. 234; *Whitehead v. Buffalo, &c. Ry. Co.*, 18 How. Pr. 230; *Redmond v. Enfield Manuf. Co.*, 13 Abb. Pr. n. s. 332; *Howell v. Chicago, &c. Ry. Co.*, 51 Barb. 378; *Barnett v. Chicago, &c. R. R. Co.*, 4 Hun, 114; *State v. District Court*, 26 Minn. 234. Compare *Estes v. Belford*, 22 Fed. Rep. 275; *Benwood Iron Works v. Hutchinson*, 101 Pa. St. 359; *Schmidlapp v. La Constance Ins. Co.*, 71 Ga. 246.

business and the authority conferred by the corporation. "Serving process on its agents in other States for matters within the sphere of their agency is, in effect, serving process on it, as much as if such agents resided in the State where it was created."¹

§ 981. If a corporation should open an office, or habitually transact business, in a foreign State, the head officer there must be deemed an agent of the company for the purpose of receiving service of process; and under these circumstances service upon the officer is binding upon the corporation itself. Thus, in *Newby v. Von Oppen and Colt's Patent Firearms Manufacturing Co.*,² the Court of Queen's Bench decided that service of a writ of summons upon the head officer of an English branch of an American corporation carrying on business in England was good service upon the company. Justice Blackburn said: "We think that, when once it is established that the corporation is to be treated as resident in England, the proper officer [upon whom to serve process] is the officer at the English branch, and that it is not necessary to serve the process on the officer at the head office abroad." But it has been held that the authority of an agent resident in a foreign State to receive service on behalf of the company extends only to cases founded upon contracts made in such foreign State, or causes of action arising there.³

§ 982. *Statutory Provisions.* — In the United States, the method of serving foreign corporations with process is generally regulated by statute. It has been decided that the States have constitutional power to require foreign corpora-

¹ *St. Clair v. Cox*, 106 U. S. 350, 355, 356. *Angerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 305. Compare *Thayer v.*

² *Newby v. Von Oppen*, L. R. 7 Q. B. 293, 296; *Moch v. Virginia, &c. Ins. Co.*, 10 Fed. Rep. 696; s. c. sub nom. *Diana v. Virginia, &c. Ins. Co.*, 13 Reporter, 457; *Weight v. Liverpool, &c. Ins. Co.*, 30 La. Ann. 1186; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 671; *Libbey v. Hodgdon*, 9 N. H. 394; *Walker v. Continental Ins. Co.*, 2 Utah, 331; *Angerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 305. Compare *Thayer v. Tyler*, 10 Gray, 164; *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422. ³ *Bawknight v. Liverpool, &c. Ins. Co.*, 55 Ga. 194, and see *Moulin v. Trenton, &c. Ins. Co.*, 4 Zab. 222, 234; s. c. 1 Dutcher, 57; *National Condensed Milk Co. v. Brandenburgh*, 40 N. J. Law, 111; *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422.

tions acting within their jurisdiction to agree that service on a specified agent of the corporation shall bind the corporation itself.¹ If a certain method of service upon foreign corporations is prescribed by general law, a company entering the State and transacting business there will be held to have submitted to the provisions of the law, and be subject to service made accordingly.²

The process of the courts of the United States may be served upon foreign corporations within a State, in the same manner as the process of the State courts. Thus, in *Ex parte Schollenberger*,³ the Supreme Court decided that, under a statute providing that a foreign corporation accepting a license to do business within the State should consent to be bound by service of process upon a specified agent within the State, the United States courts would acquire jurisdiction, to the same extent as the State courts, by service of process in the manner prescribed by the State law.

§ 983. *Suits against Foreign Corporations in New York.*—In New York the liability of foreign corporations to be sued in

¹ *Lafayette Ins. Co. v. French*, 18 How. 405.

² *Weymouth v. Washington, &c. R. R. Co.*, 1 McArthur, 19; *McNichol v. United States, &c. Agency*, 74 Mo. 457, 471; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114.

Upon the construction of these statutes, see *Camden Rolling Mill Co. v. Swede Iron Co.*, 82 N. J. Law, 18; *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301; *National Bank of Commerce v. Huntington*, 129 Mass. 444; *Emerson v. McCormick, &c. Machine Co.*, 51 Mich. 5.

If a foreign corporation fails to designate an agent, as required by law, to receive service of process, service upon a managing agent will be valid, as at common law. *Thomas v. Placerville, &c. Mining Co.*, 65 Cal. 600.

³ *Ex parte Schollenberger*, 96 U. S. 369, overruling *Day v. Newark India-Rubber Manuf. Co.*, 1 Blatchf. 628; *Pomeroy v. New York, &c. R. R. Co.*, 4 Blatchf. 120; *Myers v. Dorr*, 13 Blatchf. 22; *Stillwell v. Empire Fire Ins. Co.*, 4 Cent. L. J. 463. See also *Railroad Co. v. Harris*, 12 Wall. 65; *Knott v. Southern Life Ins. Co.*, 2 Woods, 479; *New England, &c. Ins. Co. v. Woodworth*, 111 U. S. 146; *Railroad Co. v. Koontz*, 104 U. S. 5, 10; *Gray v. Quicksilver Mining Co.*, 21 Fed. Rep. 288. Compare *Cowles v. Mercer County*, 7 Wall. 118; *Lung Chung v. Northern Pacific Ry. Co.*, 19 Fed. Rep. 254; *Ehrman v. Teutonia Ins. Co.*, 1 McCrary, 123; *Eaton v. St. Louis, &c. Mining, &c. Co.*, 2 McCrary, 362; *Merchants' Manuf. Co. v. Grand Trunk Ry. Co.*, 63 How. Pr. 459.

the courts of the State, and the method of serving them with process, are regulated by the Code of Civil Procedure. An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action; but an action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, only in certain specified cases.¹ It has been held, under these provisions, that a foreign corporation waives the right of objecting to the jurisdiction of the court by appearing generally;² and if a claim against a foreign corporation is assigned by a non-resident or other foreign corporation to a resident or a domestic corporation, the assignee may maintain a suit upon the claim.³

Section 432 of the Code of Civil Procedure prescribes the method of obtaining personal service upon a foreign corporation, and the officers through whom service may be made. Under this section it was held that valid service upon a foreign corporation could be obtained by delivering a copy of the summons to the president of the company, who was temporarily within the State, on his way to a seaside resort, for purposes of his own, and not upon any business of the company, it appearing, moreover, that the company had no place of business, and transacted no business, and had no property, within the State. The Court of Appeals said: "The object of all service of process for the commencement of a suit or other legal proceeding is to give notice to the party proceeded against, and any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law; and what service shall be deemed sufficient for that purpose is to be determined by the legislative power of the country in which the proceeding is instituted, subject only

¹ Code, § 1780. As to the right of foreign corporations to sue in New York, see the Code, § 1779.

² *McCormick v. Pennsylvania Cent. R. R. Co.*, 49 N. Y. 808; *Brooks v. New York, &c. R. R. Co.*, 80 Hun, 47.

³ *Ervin v. Oregon Ry., &c. Co.*, 28 Hun, 269; 85 Hun, 544; *McBride v. Farmers' Bank*, 26 N. Y.

450; *Petersen v. Chemical Bank*, 82 N. Y. 40, 48.

to the limitation that the service must be such as may reasonably be expected to give the notice aimed at."¹

This decision has not been followed by the Circuit Court of the United States in New York. In *Good Hope Co. v. Railway Barb Fencing Co.*,² Wallace, J., held that a foreign corporation was not "found" within the district, within the meaning of the provisions of the United States Revised Statutes in relation to the service of process, by service upon the president, who had come into the district temporarily upon special business, the corporation having no office or place of business there.

§ 984. *Corporations chartered by the United States Government.* — It is well settled that Congress has power under the Constitution to charter corporations, in order to accomplish any of the authorized purposes of the Federal government;³ and it is equally clear that the right of corporations, chartered by Congress for Federal purposes, to exercise their franchises throughout the United States, rests wholly upon the powers conferred by the Constitution upon Congress, and not upon the mere comity of the several States.⁴ Corporations chartered by the Congress of the United States are, therefore, usually to be regarded as "domestic," and not as "foreign" corporations, in every State and Territory of the Union.⁵ This, however, does not apply to corporations chartered by Congress in the exercise of its powers of local legislation over the District of Columbia.⁶

§ 985. *Jurisdiction of Circuit Courts in Suits brought by or against Corporations chartered by Congress.* — By the Consti-

¹ *Pope v. Terre Haute Car, &c. Co.*, 87 N. Y. 137, 140. See also *Hiller v. Burlington, &c. R. R. Co.*, 70 N. Y. 228, 227, 228; *Gibbs v. Queen Ins. Co.*, 68 N. Y. 114.

² *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635. Compare *Estes v. Belford*, 22 Fed. Rep. 275; *Block v. Atchison, &c. R. R. Co.*; 21 Fed. Rep. 529; *Hussey Manuf. Co. v. Deering*, 20 Fed. Rep. 795.

³ *Supra*, § 9.

⁴ See *Farmers', &c. Nat. Bank v. Dearing*, 91 U. S. 29.

⁵ *Commonwealth v. Texas, &c. R. R. Co.*, 98 Pa. St. 90. Compare *Market Nat. Bank v. Pacific Nat. Bank*, 64 How. Pr. 1.

⁶ *Day v. National Life Ins. Co.*, 64 Ind. 1; *Hadley v. Freedman's Sav., &c. Co.*, 2 Tenn. Ch. 122; *Williams v. Creswell*, 51 Miss. 817.

tution, Congress is invested with power to confer jurisdiction upon the Circuit Courts over any suit "arising under . . . the law of the United States."¹ In *Osborn v. Bank of the United States*,² the Supreme Court decided that this provision of the Constitution enabled Congress to authorize all suits brought by or against the Bank of the United States, a corporation chartered by Congress, to be brought in the Circuit Courts; and Chief Justice Marshall, in his opinion, expressed the view that Congress had the power to extend the jurisdiction of the Circuit Courts to all suits brought by or against any corporation chartered by a law of the United States. When it is borne in mind that Congress has the power to charter corporations only in order to accomplish some Federal purpose, and that such corporations are therefore in a measure agencies of the Federal government, the wisdom of this view seems beyond question.³ It is the settled law of the United States at the present day.⁴

§ 986. The act of Congress of March 3, 1875, provides, that "any suit of a civil nature, . . . arising under the Constitution or laws of the United States," may be removed by either party into the Circuit Court of the United States. In the *Pacific Railroad Removal Cases*,⁵ the Supreme Court

¹ Constitution, Art. III.

² *Osborn v. Bank of the United States*, 9 Wheat. 825.

³ In delivering the opinion, Chief Justice Marshall said: "The clause giving the bank a right to sue in the Circuit Courts of the United States stands on the same principle with the acts authorizing officers of the United States, who sue in their own names, to sue in the courts of the United States. The Postmaster-General, for example, cannot sue under that part of the Constitution which gives jurisdiction to the Federal courts in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. He comes into the courts of the Union

under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said that it is such a case, because a law of the United States authorizes the contract and authorizes the suit, the same reasons exist with respect to a suit brought by the bank."

⁴ See *Pacific R. R. Removal Cases*, 115 U. S. 1. The dissenting justices in this case did not dissent on this point.

⁵ *Pacific R. R. Removal Cases*, 115 U. S. 1; *Ames v. Kansas*, 111 U. S. 449; *Hughes v. Northern Pacific Ry. Co.*, 18 Fed. Rep. 106.

decided that this act authorized any corporation chartered by Act of Congress to remove any suit in which it was a party, into the Circuit Court, on the ground that such suit was a suit "arising under . . . the laws of the United States," within the meaning of the Constitution and the act of Congress. The majority of the court reached this conclusion upon the ground that the Removal Act was in the same language as the constitutional provision fixing the extent of the jurisdiction which Congress could confer upon the Circuit Courts, and that the construction placed upon the constitutional provision in *Osborn v. Bank of the United States* must therefore be followed in construing the act.¹

§ 987. *Jurisdiction in Suits brought by or against National Banks.* — The National Banking Act of 1864 provided that the Circuit Courts of the United States should have jurisdiction of all suits brought by or against any national bank established in the district for which the court is held.² Under this provision, it was held that national banks could sue or be sued in the proper Circuit Court, irrespective of the citizenship of the parties or the amount in dispute;³ but the provision referred to was held to apply only to transitory actions, and not to such actions as are by law local in their

¹ Chief Justice Waite and Justice Miller dissented.

It should be observed that section 640 of the Revised Statutes provides that "any suit commenced in any court other than a Circuit or District Court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, . . . may be removed for trial in the Circuit Court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution, or of any treaty or law of the United States."

² See U. S. Rev. Sts., sect. 629, par. 10; also Rev. Sts. U. S. (2d ed.), sect. 5198.

³ *County of Wilson v. National Bank*, 103 U. S. 770; *First Nat. Bank v. Douglas County*, 3 Dill. 298; *Third Nat. Bank v. Harrison*, 8 Fed. Rep. 721; *First Nat. Bank v. Bohne*, 8 Fed. Rep. 115; *Commercial Nat. Bank v. Simmons*, 1 Flipp. 449; *Mitchell v. Walker*, 86 Leg. Intel. 74, 158; *Kennedy v. Gibson*, 8 Wall. 498, 506. Compare *Scheffer v. Nat. Life Ins. Co.*, 25 Minn. 584; *New Orleans Nat. Bank v. Adams*, 8 Woods, 21.

character, such as suits relating to real estate, or proceedings *in rem*.¹

The provision referred to did not deprive the State and Federal courts outside of the district in which a national bank was established of jurisdiction in suits brought by or against such bank. And it was held that, in determining the jurisdiction of the Circuit Courts in suits brought by or against national banks outside of the district in which they were located, they must be regarded as citizens of the State in which they were established.²

In 1882 it was enacted by Congress "that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun: and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."³

§ 988. *Methods of winding up Corporations recognized by Comity.*—By the law of comity, corporate associations formed in other States may sue and be sued, in their corporate capacity, wherever jurisdiction can be obtained over them. This rule is established in order to secure the convenient administration of justice. For the same reason, it has been held

¹ *Casey v. Adams*, 102 U. S. 66. the acts fixing the jurisdiction of the Circuit Courts, but upon the theory that it was the intention of Congress, in chartering a corporation for the purpose of doing business in a particular State, to place it upon the same footing as other corporations of the State with respect to the right of suing in the Federal courts.

² See *National Park Bank v. Nichols*, 4 Biss. 315; *St. Louis Nat. Bank v. Allen*, 5 Fed. Rep. 551; *Manufacturers' Nat. Bank v. Baack*, 8 Blatchf. 137; *Commercial Nat. Bank v. Simmons*, 1 Flipp. 449, 505; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Davis v. Cook*, 9 Nev. 134.

This conclusion was not reached on the theory that a national bank is a citizen within the meaning of

³ Act of July 12, 1882, chap. 290, § 4. See *Union National Bank v. Miller*, 15 Fed. Rep. 708.

that, if a corporation is considered in existence for the purpose of suing and being sued and winding up its affairs, after having been dissolved and prohibited from further prosecuting its business in the State where it was created, it will also be considered in existence for that purpose in foreign States. In *Hunt v. Columbian Insurance Co.*, Barrows, J., said: "If by law or usage in the courts of the State of New York, where the judgment was rendered, the corporation may still be a party of record, and suits maintained or defended in its name, though its affairs there are under the guardianship of the servants of the court, it must be considered as having a qualified existence so long as judgments can be rendered for or against it in the courts of that State."¹

The same principle was applied by the Supreme Court of the United States in *Relfe v. Rundle*.² Under the laws of Missouri, where an insurance company had been incorporated, the superintendent of the insurance department became vested with all the property of the company as its statutory assignee, upon the dissolution of the company by a decree of court. The court held that the assignee so appointed could sue in the courts of Louisiana to collect the assets of the company, and could remove a case into the Federal courts on the ground of citizenship. Chief Justice Waite said: "Relfe is not an officer of the Missouri State court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters

¹ *Hunt v. Columbian Insurance Co.*, 55 Me. 290, 294; *Life Ass. of America v. Fassett*, 102 Ill. 315; *Folger v. Columbian Ins. Co.*, 99 Mass. 267. Compare *Kincaid v. Dwinelle*, 59 N. Y. 546; *Sturges v. Vanderbilt*, 73 N. Y. 384. See also *Michigan State Bank v. Gardner*, 15 Gray, 362; *National Trust Co. v. Miller*, 33 N. J. Eq. 155, 158.

² *Relfe v. Rundle*, 108 U. S. 222, 225; *Life Ass. of America v. Levy*, 33 La. Ann. 1203.

connected with his trust. He is trustee of an express trust, with all the rights which properly belong to such a position. . . . He appeared in Louisiana, not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the corporation itself for all the purposes of winding up its affairs."

§ 989. *The Rule of Comity applied to Quasi Corporations.* — Every reason and every principle underlying the rule of the common law by which corporations chartered by foreign States are authorized to transact business and appear in the courts in a corporate capacity, applies equally to associations formed in other States with only part of those qualities which are ordinarily attributed to corporations, as, for example, limited partnerships, joint-stock companies, and other quasi corporations. The chief difference between such associations and corporations is in the name.¹

It has always been held that joint-stock companies formed in foreign States may, under the common law, carry on business through their agents, though such companies have all the essential characteristics of corporations.

It has also been held that, if a joint-stock company or large partnership can, under the laws of the State in which it was formed, sue and be sued in a name which it has adopted, or in the name of one of its officers, it may sue and be sued in the same name in other States, unless the laws in force where the suit is brought prescribe other remedies.²

§ 990. The remedies by which the rights of parties may be protected and enforced undoubtedly depend upon the laws of the State where suit is brought. And the fact that the members of a partnership must, by the laws of the State in which their association was formed, sue and be sued in

¹ See *supra*, § 6.

² *Maltz v. American Express Co.*, 1 Flipp. 611. Compare *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566, affirming *Oliver v. Liverpool, &c. Ins. Co.*, 100 Mass. 531. *Supra*, § 18.

In accordance with this view, see *Leonardsville Bank v. Willard*, 25 N. Y. 574, affirming 16 Abb. Pr. 111; *East River Bank v. Judah*, 10 How. Pr. 185; *Case v. Mechanics' Banking Ass.*, 1 Sandf. 693; *Delafield v. Kinney*, 24 Wend. 347.

the partnership name on account of partnership transactions, would not be a ground for refusing to permit suits to be brought by or against the partners in their individual names in another State.¹ However, a partnership or joint-stock association may be so large, or of such a character, that it would be very difficult, if not practically impossible, to adjust and enforce the rights and liabilities of its members unless the association is permitted by the courts to sue and be sued through its officers by some common name; and if such an association may in the State where it is created sue and be sued by some common name, the principle of the law of comity would render the same rule applicable in other States.

If an association is substantially a corporation, it may sue and be sued as a corporation in the Federal courts, and the jurisdiction of the courts with respect to citizenship will be governed by the rules applicable to ordinary corporations, although the association be *called* a joint-stock company or partnership in the State in which it was formed.²

PART II.

CORPORATIONS CHARTERED BY SEVERAL STATES.

§ 991. **Reincorporation of an Association incorporated in another State.** — By the law of comity, a company formed for the purpose of carrying on business in several States is enabled to act in a corporate capacity beyond the territorial limits of the State from which its franchises are derived. The privilege thus bestowed is a mere license, revocable at the will of the State.³ The same is true of a license expressly given to a foreign corporation by statute. Such license does

¹ *Boston, &c. R. R. Co. v. Pearson*, 128 Mass. 445. See *supra*, § 876. pool Ins. Co. v. Massachusetts, 10 Wall. 566; *Fargo v. McVicker*, 55 Barb. 487. Compare *Dinsmore v. Philadelphia, &c. R. R. Co.*, 11 Phila. 483, *per McKennan, J.*

² *Maltz v. American Express Co.*, 1 Flipp. 611; *Fargo v. Louisville, &c. Ry. Co.*, 6 Fed. Rep. 787; *Liver-*

³ *Supra*, § 970.

not confer a new charter upon the corporators, or alter their original charter, but merely gives them permission to carry out their enterprise as originally agreed upon; and, if granted without a consideration, the license may be revoked at any time by the State.¹

A State may, however, grant a complete charter of incorporation to an association, and confer upon it all the rights, powers, and duties belonging to other corporations chartered by the State, although the association may already have been chartered and organized as a corporation under the laws of a foreign State.

An act of the legislature purporting to reincorporate an association already chartered by a foreign State has the same effect as a statutory license, so far as it involves a grant of the privilege of acting in a corporate capacity. But the complete reincorporation of an association, unlike a mere license, implies an intention on the part of the legislature to take away its character as a foreign corporation, and to place it upon the same footing with other corporations formed within the State. The association is thus invested with all the rights and duties of a domestic corporation in the several States by which it has been chartered. Each charter, when accepted, becomes a part of the constitution of the company, and a contract arises which cannot be impaired by subsequent legislation.

§ 992. *Difference between Reincorporation and Statutory License.* — Whether legislation of a State authorizing a foreign corporation to transact business within its jurisdiction operates merely as a statutory license, or reincorporates the company and places it upon the footing of a domestic corporation within the State, can be determined only by construction of the legislative acts. The question in each case is whether the legislature intended to place the corporation upon the footing of a corporation chartered within the State.

¹ *Doyle v. Continental Ins. Co., v. New York, &c. R. R. Co.*, 13 94 U. S. 535. R. I. 260; *Blackstone Manuf. Co.*

² Compare *Clark v. Barnard*, 108 U. S. 486; *Inhab. of Blackstone*, 13 Gray, U. S. 489; *Boston, &c. R. R. Co.* 489.

No peculiar language is necessary to reincorporate a foreign corporation and constitute it a domestic corporation within the State; any language indicating the will of the legislature is sufficient. The legislature may grant an original charter of incorporation by implication,¹ and so it may charter and reincorporate an association already chartered by another State, by implication.²

Accordingly, in considering the legal status of an association incorporated by similar legislation in the States of Alabama, Mississippi, and Tennessee, Hammond, J., said: "It depends upon the intention of the legislature of Tennessee whether this corporation is a Tennessee corporation, or only the corporation of another State, licensed to operate within this State. In creating a Tennessee corporation, it might select as corporators citizens of the State or of other States, or of both or any number of States, or it might incorporate the same citizens as were incorporated by the other States, and give the same powers, privileges, etc.; or it might only license the foreign corporation to do business here as a foreign corporation. We think, on a careful reading of the whole legislation, that it was intended to adopt the corporation of Mississippi as a Tennessee corporation, and that, while no separate organization was required, yet for the purpose of jurisdiction a separate corporation was in fact created, with its status fixed as a Tennessee corporation; and for all purposes it was intended to consolidate them to the only extent which can be done under our system."³

§ 998. A statutory license authorizing a foreign corporation to do business within the State does not alter the com-

¹ *Supra*, § 18.

² *Grangers' &c. Ins. Co. v. Kamper*, 78 Ala. 325, 344; *Boston, &c. R. R. Co. v. New York, &c. R. R. Co.*, 13 R. I. 260; *Clark v. Barnard*, 108 U. S. 436; *Memphis, &c. R. R. Co. v. Alabama*, 107 U. S. 581.

³ *Blackburn v. Selma, &c. R. R. Co.*, 2 Flipp. 525, 537; *Copeland v. Memphis, &c. R. R. Co.*, 3 Woods,

651; *Stout v. Sioux City, &c. R. R. Co.*, 3 McCrary, 1; *Railroad Company v. Harris*, 12 Wall. 65.

For cases in which legislation relating to a foreign corporation was held to operate merely as a statutory license, see *Moore v. Chicago, &c. Ry. Co.*, 21 Fed. Rep. 817; *Wilkinson v. Delaware, &c. R. R. Co.*, 22 Fed. Rep. 353; and *infra*, § 999 a.

-C41
C44

pany's constitution, but merely gives the company a legal right to act pursuant to its constitution outside of the State by which it was chartered. On the other hand, the reincorporation of a corporation chartered by a foreign State involves an alteration of the constitution of the company as originally formed, and the creation of new legal relations. Such reincorporation must therefore be assented to by the shareholders before it can take effect.

If the articles of agreement by which an association is formed provide for the incorporation or reincorporation of the association pursuant to the laws of another State, the managing agents of the association undoubtedly have authority to take such steps as are necessary to procure the incorporation of the association pursuant to the laws of such State, and no further acceptance or assent is necessary. A corporation may also assent to a reincorporation by implication, as by accepting the benefits conferred by the second charter, or by assuming the franchises which it confers within the jurisdiction of the State which granted it. McCrary, J., said: "It is entirely competent for the State, by its legislation, to determine the mode of creating corporations within its limits; and, if it sees fit to declare that a foreign corporation may become a corporation of the State by building a railroad therein, and filing a copy of its articles of incorporation with the Secretary of State, I have no doubt that compliance with these terms constitutes the foreign corporation a domestic corporation, with respect to all of its transactions within such State."¹

§ 994. *The Nature and Legal Status of Companies chartered by several States.* — The franchises or privileges which a corporation may exercise within the jurisdiction of any State must in all cases be derived wholly from the laws of that particular State. And this is equally true, whether a corporation be admitted to act in a State by the common law rule of comity merely, or by an express statutory license, or by a grant of a complete charter. The Supreme Court of Illinois

¹ *Stout v. Sioux City, &c. R. R. Co.*, 3 McCrary, 1, 5; s. c. 8 Fed. Rep. 794.

said: "The legislatures of this State and of Missouri cannot act jointly, nor can any legislation of the last-named State have the least effect in creating a corporation in this State. Hence the corporate existence of appellants, considered as a corporation of this State, must spring from the legislation of this State, which by its own vigor performs the act. The States of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two States, without being a corporation of each State or of either State. As argued by appellee, the only possible status of a company acting under charters from two States is, that it is an association incorporated in and by each of the States, and when acting as a corporation in either of the States it acts under the authority of the charter of the State in which it is then acting, and that only; the legislation of the other State having no operation beyond its territorial limits."¹

§ 995. But although each charter of a company incorporated by different States can operate as a grant of franchises only within the jurisdiction of the State enacting it, yet the company itself does not on that account cease to be one company, having one undivided enterprise. A company thus constituted is in reality but a single corporation, formed by agreement of its members for the purpose of carrying on business in a corporate capacity in several States. The several charters, taken together, form the constitution of the corporation; and together they contain the agreement between the corporators, by which the scope of their enterprise and the powers of a majority are determined.

¹ Quincy Bridge Co. v. Adams by several States, each State may, County, 88 Ill. 619, *per* Justice for cause, revoke the franchises Breese; Commonwealth v. Pittsburg, &c. R. R. Co., 58 Pa. St. 26; granted by it; and it seems that in such case the charters granted by Port Royal R. R. Co. v. Hammond, 58 Ga. 523; Eaton, &c. R. R. Co. v. the other States will continue unimpaired. Hart v. Boston, &c. R. R. Hunt, 20 Ind. 457. Co., 40 Conn. 589.

Where a corporation is chartered

In *Covington and Cincinnati Bridge Company v. Mayer*, the Supreme Court of Ohio said: "We are satisfied that this corporation, having been chartered and organized under the laws of both States, might lawfully hold its meetings and transact its corporate business in either State. To hold otherwise would be to make every corporate act of the company ineffectual, unless repeated in both States. Every meeting of its stockholders or directors would have to be twice held, and its business twice transacted, in order to make it valid and effectual. *The truth is, that this is a single corporation, clothed with the powers of two corporations.* It acts under two charters, which in all respects are identical, except as to the source from which they emanate. What is authorized by one of these charters is authorized by both. What may lawfully be done under one may lawfully be done under both. Otherwise, a corporation with two charters has less power and privilege in many respects than a corporation with a single charter."¹

§ 996. For the purposes of acting, contracting, suing, and being sued, a company incorporated under the laws of several States is a single corporation, both in fact and in law. Thus, if a railroad company incorporated in three States and a domestic corporation in each State should execute a mortgage upon its entire property in all of the States, the Circuit Court of the United States in either State would have jurisdiction to foreclose the mortgage, and order a sale of the entire property in all the States. Separate suits in the several States would not be necessary.² A corporation chartered by several States may, by the use of a fiction, be regarded as a distinct corporation in each State, within the purpose and meaning of particular laws by which it may be affected. Thus, it may be treated in each State as a citizen of that State only in determining the jurisdiction of the Federal courts, or the application of special rules of prac-

¹ 31 Ohio St. 325, *per* Welch, J.; *Wilmer v. Atlanta, &c. Ry. Co.*, 2 *Covington v. Covington, &c. Bridge Woods*, 417.

Co., 10 Bush (Ky.), 69; *Railroad* ² *Blackburn v. Selma, &c. R. R. Co. v. Harris*, 12 Wall. 82. See *Co.*, 2 Flipp. 525.

tice.¹ But this does not alter the fact that such a corporation is really a single association, upon whom several States have conferred franchises, and who have associated for the purpose of carrying on business in each of the States, under the franchises which they are entitled to exercise within its jurisdiction.²

§ 997. *The Charter of a Corporation incorporated in several States.* — The constitution of a corporation cannot be altered without the unanimous consent of its shareholders. A State may grant to a company incorporated in another State a new charter of franchises; but it cannot impair the contract between the shareholders of the company, or enable the majority to depart from the original purposes upon which the shareholders have unanimously agreed. The purposes of a corporation cannot be altered or extended, either at home or abroad, without the consent of every member.³

It is clear that one association cannot have two constitutions. A corporation may possess franchises under charters granted by several States; but there can be only one fundamental agreement between its members. An alteration of this fundamental agreement in one State necessarily involves an alteration of the character of the company, wherever it be. Hence it follows, that a corporation carrying on business in several States cannot lawfully alter its character or constitution under a charter granted by either State, without obtaining the consent of the other State also. It is not ne-

¹ *Infra*, § 999.

² It is undoubtedly conceivable that a number of persons should in fact form two exactly similar associations having the same membership, the same constitution, the same officers and agents, and the same places of business. And it is conceivable that any act performed by either of these associations should, by agreement, be deemed binding upon the other association also. But this is certainly not really the case where a corpo-

ration is incorporated by several States, and there is no benefit to be gained by introducing such a notion through a fiction. It would be extremely difficult to adjust and enforce the rights and obligations of a corporation chartered by several States, according to the established rules of law and procedure, if it were in fact a union of several distinct associations.

³ *Aspinwall v. Ohio, &c. R. R. Co.*, 20 Ind. 492.

cessary that this consent be evidenced by an express grant of authority; it may be implied from the original charter granted to the company, or from the general law of comity.¹

An opinion has been intimated, that, where several States join in incorporating the same company, a contract arises between the several States, as well as between each State and the company.² This may be true in certain cases; but it is difficult to perceive how a contract between two States can result from the mere fact that both States have granted a charter to the same company. It is certainly not clear what the terms of this contract would be.

§ 998. *Application of Statutes.*—A company incorporated under the laws of several States has been held to be, in each State, a corporation created by that State, within the meaning of its revenue laws. Thus, a corporation chartered by the State of Indiana, and afterwards invested with a new charter by the State of Illinois, is an Illinois corporation, within the meaning of a statute of Illinois purporting to tax all corporations created under the laws of that State.³ It is obviously a reasonable construction of a statute, purporting to regulate all railroad companies incorporated by a State, to hold that such statute applies to foreign companies reincorporated by the State, or permitted to exercise their franchises and operate a line of road within its territory.⁴

¹ Compare *Covington v. Covington, &c. Bridge Co.*, 10 Bush, 69, 79; *Atty.-Gen. v. Boston, &c. R. R. Co.*, 109 Mass. 99; *Commonwealth v. Pittsburg, &c. R. R. Co.*, 58 Pa. St. 26, 42; *Fisk v. Chicago, &c. R. R. Co.*, 53 Barb. 515; *Atty.-Gen. v. Petersburg, &c. R. R. Co.*, 6 Ired. 472, 473.

² *Brocket v. Ohio, &c. R. R. Co.*, 14 Pa. St. 244; *Cleveland, &c. R. R. Co. v. Speer*, 56 Pa. St. 325. See *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. 1, 128-150, and compare dissenting opinions of Archer and Dorsey, JJ., pp. 208-225, 249-257; also

Covington v. Covington, &c. Bridge Co., 10 Bush, 69; *Hart v. Boston, &c. R. R. Co.*, 40 Conn. 539.

³ *Railroad Co. v. Vance*, 96 U. S. 450; and see *Quincy Bridge Co. v. Adams County*, 88 Ill. 619; *State v. Metz*, 32 N. J. Law, 199; *Goshorn v. Ohio County*, 1 W. Va. 308; *Baltimore, &c. R. R. Co. v. Marshall County*, 3 W. Va. 319. Compare *Blackstone Manuf. Co. v. Inhab. of Blackstone*, 13 Gray, 488.

⁴ *McGregor v. Erie Ry. Co.*, 35 N. J. Law, 116; *Sage v. Lake Shore, &c. Ry. Co.*, 70 N. Y. 220. Compare *Phillipsburgh Bank v. Lacka-*

If a company has been incorporated under the laws of several States, it may be served with process in either State, as if it were a corporation of that State alone.¹

§ 999. **Citizenship with regard to the Jurisdiction of the Circuit Courts.**—In applying the constitutional provision and acts of Congress conferring jurisdiction upon the Circuit Courts of the United States, the shareholders or members of a corporation must be conclusively presumed to be citizens of the State or country under the laws of which they were incorporated. Practically, therefore, a corporation must be treated as a citizen of the State in which it was formed.²

The franchises which a corporation chartered by several States can exercise in either State must be derived from the laws of that State alone.³ And it has been decided that, for the purpose of determining the jurisdiction of the Circuit Courts, a corporation chartered by several States must, when sued in either State, be treated as a citizen of that State alone. Thus, a corporation chartered by the States of Illinois and Wisconsin may be sued in the Circuit Court in Wisconsin, by a citizen of Illinois, as if the company were a citizen of Wisconsin only. The Supreme Court of the United States said: "In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that State. It is not *there* a corporation or a citizen of any other State. Being *there* sued, it can only be brought into court as a citizen of that State, whatever its status or citizenship elsewhere."⁴

wanna R. R. Co., 27 N. J. Law, 206;

² *Supra*, § 975.

Martin v. Mobile, &c. R. R. Co.,

³ *Supra*, § 959.

7 Bush (Ky.), 116.

⁴ *Railway Co. v. Whitton*, 13

¹ *Richardson v. Vermont, &c.* Wall. 283. To the same effect, *R. R. Co.*, 44 Vt. 613; *Gardner v. James*, 5 R. I. 235; *Maryland v. Northern Central Ry. Co.*, 18 Md. 193; and see *Railroad Co. v. Harris*, 12 Wall. 65, 83; *Baltimore, &c. R. R. Co. v. Gallahue's Admr.*, 12 Gratt. 658; *Baltimore, &c. R. R. Co. v. Wightman's Admr.*, 29 Gratt. 431.

see *Muller v. Dows*, 94 U. S. 447; *Colglazier v. Louisville, &c. Ry. Co.*, 22 Fed. Rep. 568; *Minot v. Philadelphia, &c. R. R. Co.*, 2 Abb. (U. S.) 323; 18 Wall. 206. See also *Memphis, &c. R. R. Co. v. Alabama*, 107 U. S. 581; *Ohio, &c. R. R. Co. v. Wheeler*, 1 Black, 297; *County of Allegheny v. Cleve-*

§ 999 *a*. However, the recognition of a foreign corporation by statute, or the grant of a statutory license authorizing a foreign corporation to act throughout the territory of a State, does not enable the Circuit Courts of the United States to take jurisdiction of suits brought by or against such corporation, as if it were a citizen of the State. For this purpose, it is necessary that the company be fully reincorporated, or, in other words, that it be placed upon the same footing as a domestic corporation under the laws of the State in which the suit is brought.¹

§ 1000. Consolidation of Corporations under the Laws of different States. — A consolidation of several corporations into one involves the formation of a new corporation out of the united shareholders of the old.² Companies originally chartered by different States may be thus united into a single corporation, by virtue of legislation passed in each of the States.³ In such case the new company becomes invested with all the rights and duties of a corporation in each State; but the franchises of the company in each State are derived from the legislation of that State alone.⁴

land, &c. R. R. Co., 51 Pa. St 228; 65, 83; Railway Co. v. Whitton, Horne v. Boston, &c. R. R. Co., 18 13 Wall. 270, 285; Baltimore, &c. R. R. Co. v. Noell, 32 Gratt. 394; Fed. Rep. 50.

The following cases seem to have been decided incorrectly: Nashua, &c. R. R. Co. v. Boston, &c. R. R. Co., 8 Fed. Rep. 458; s. c. 19 Fed. Rep. 804; Pacific Railroad v. Missouri Pacific Ry. Co., 23 Fed. Rep. 565. See also the *dicta* in Stout v. Sioux City, &c. Ry. Co., 8 Fed. Rep. 794.

¹ Insurance Co. v. Francis, 11 Wall. 210. See Doyle v. Continental Ins. Co., 94 U. S. 535; Hatch v. Chicago, &c. R. R. Co., 6 Blatchf. 105; Williams v. Missouri, &c. Ry. Co., 3 Dill. 267; Pomeroy v. New York, &c. R. R. Co., 4 Blatchf. 120; Stevens v. Phoenix Ins. Co., 41 N. Y. 149. Compare Railroad Co. v. Harris, 12 Wall.

² *Supra*, § 942.
³ See Bishop v. Brainerd, 28 Conn. 298, 299.

⁴ Racine, &c. R. R. Co. v. Farmers' L. & T. Co., 49 Ill. 349, 350; Philadelphia, &c. R. R. Co. v. Maryland, 10 How. 376; Mead v. New York, &c. R. R. Co., 45 Conn. 199; Quincy Bridge Co. v. Adams County, 88 Ill. 619; Eaton, &c. R. R. Co. v. Hunt, 20 Ind. 459;

§ 1001. A corporation formed by consolidation of several companies under the laws of different States must, while in either State, be treated as a citizen of that State alone in determining the jurisdiction of the Circuit Courts of the United States.¹ And such company will generally be considered in each State as a corporation created or chartered by that State, within the purview of its legislative enactments.²

Gardner v. James, 5 R. I. 285; Quincy Bridge Co. v. Adams
Maryland v. Northern Central Ry. County, 88 Ill. 619; Sage v. Lake
Co., 18 Md. 193. Shore, &c. Ry. Co., 70 N. Y. 220;

¹ Muller v. Dows, 94 U. S. 447; Ohio, &c. R. R. Co. v. Weber, 96
Blackburn v. Selma, &c. R. R. Co., Ill. 443; Chicago, &c. Ry. Co. v.
2 Flipp. 525. And see cases *supra*, Auditor-General, 58 Mich. 79.
§ 999.

CHAPTER XIV.

LOSS OF THE CORPORATE FRANCHISES AND DISSOLUTION
OF CORPORATIONS.§ 1002. *Difference between Dissolution and Loss of Franchises.*

— There is a broad and fundamental distinction between the dissolution of a corporation and the loss of its franchise or legal right to exist. Much confusion may be avoided by bearing in mind this distinction.

A private corporation, as has been pointed out, is a voluntary association of individuals.¹ This association may undoubtedly continue to exist, as a matter of fact, after its franchise or legal right to exist has expired or been extinguished. A corporation continuing to carry on business after its franchise has expired or been extinguished would, in technical language, be a corporation *de facto*, but not *de jure*.

To continue the operations of a corporation after its legal right to exist has ceased, is undoubtedly prohibited by the common law, and the validity of the acts and transactions of the corporation under these circumstances would be affected by the legal prohibition. Such a corporation would certainly possess no special powers, like the power of condemning property, which the law confers only upon corporations existing by legal right.² But the courts cannot reasonably ignore the existence of such a corporation, if it is an immutable fact; nor would the acts and dealings of the corporation necessarily be legally ineffective, or its contracts of no binding force.³

¹ See *supra*, § 7.

² *Re Brooklyn, &c. Ry. Co.*, 72 N. Y. 245; 81 N. Y. 89; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524; and see *supra*, § 968.

VOL. II. — 27

³ See *supra*, §§ 741, 750 *et seq.*

St. Louis Gas Light Co. v. City of St. Louis, 11 Mo. App. 55; *Briggs v. Cape Cod, &c. Canal Co.*, 187 Mass. 71.

On the other hand, a corporation may be dissolved *de facto* before its legal right to exist has expired, and before it is dissolved *de jure*. Thus, if all the shareholders of a corporation should, by unanimous agreement, cancel their shares, wind up the company's business, and disband the organization, before their charter had expired, the association would no longer exist as a matter of fact; but under these circumstances the courts would still deem the corporation in existence, and use the fiction of a corporate entity for the convenient administration of justice.¹

§ 1008. If the charter of a corporation limits its existence to a definite period of time, the franchise or right to exist would expire at the time limited, and ordinarily the agreement of the shareholders would expire also. Hence, the corporation would cease to exist *de facto*, as well as *de jure*, at the time fixed by the charter, just as a limited partnership would cease to exist at the expiration of the time fixed by the articles of copartnership.² If the shareholders of the corporation should preserve the corporate organization, and continue the company's operations after the expiration of their charter, the corporation would be a corporation *de facto* existing without legal right. The same would be true if the franchise conferred by the charter should for any reason cease before the agreement between the shareholders constituting the corporation has expired.³

The franchise to exist and carry on business as a corporation continues indefinitely, unless the time of its duration is expressly limited in the grant. If the corporation should be guilty of any wrongful act or neglect of duty which would give the State a right to declare the franchise forfeited, the franchise would nevertheless continue until the forfeiture has been claimed and enforced by the State, through the proper legal proceedings. The commission of a wrongful act or neglect of duty by a corporation would evidently not *per se* put an end to the actual existence of the corporate association.

¹ *Infra*, § 1011.

² *Infra*, § 1005.

³ See *Briggs v. Cape Cod, &c.*

Canal Co., 187 Mass. 71; *Walla-met Falls Canal, &c. Co. v. Kit-tridge*, 5 Sawy. 44.

§ 1004. **How a Corporation may be dissolved.** — An ordinary business corporation may cease to do business, and wind up its affairs, whenever a majority of the shareholders deem this to be advisable;¹ but the franchises conferred upon the shareholders by the State are not extinguished by a mere cessation of business thus brought about. The company still continues to be a corporation in the eye of the law, and may sue and be sued in that capacity; and it is possible that a corporation which has voluntarily ceased to do business, and sold out its property, may in certain cases recognize and begin its business anew, if this appear desirable to a majority of the shareholders.²

A corporation can be dissolved, and its existence *wholly* terminated, only by extinguishment of the corporate franchise conferred by the State upon the body of corporators; for so long as this franchise exists the company continues to be a corporation in legal contemplation, and may sue and be sued in that capacity. The dissolution of a corporation, and extinction of its franchises, may occur in either of the following ways: —

First. By expiration of the charter.

Secondly. By failure of any essential part of the corporate organization, provided it cannot be restored.

Thirdly. By dissolution and surrender of the franchises with the consent of the State.

Fourthly. By legislative enactment, if no constitutional provision be violated.

Fifthly. By forfeiture of the franchises and judgment of dissolution obtained in a proper judicial proceeding.

§ 1005. **Dissolution by Expiration of the Charter.** — If a corporation was chartered to exist during a limited period of time, or until a certain day, its existence will cease upon the expiration of the time or the occurrence of the day prescribed by the charter.³ There is no difference in this respect be-

¹ *Supra*, § 413.

² *People v. Walker*, 17 N. Y. 502;

³ See *Featherstonhaugh v. Lee* 7 Coldw. (Tenn.) 432; *Bank of Moor, &c. Clay Co., L. R. 1 Eq.* 318; and compare *supra*, § 867. *La Grange, &c. R. R. Co. v. Rainey*, *Mississippi v. Wrenn*, 8 Sm. & M.

tween a corporation and a copartnership formed by agreement of its members to continue during a limited time, except that in case of a copartnership the existence of the association may be extended by unanimous consent of its members beyond the time first agreed upon, while the *lawful* existence of a corporation cannot be continued, even by unanimous consent of its members, after their franchise of acting in a corporate capacity has expired.

§ 1006. *Charters limited by a Contingency.*—It is clear that, by the use of apt words in the charter or statute under which a corporation is formed, its franchises may be so limited that they shall expire upon the happening of any prescribed event or contingency.¹ A distinction must, however, be observed between words limiting the existence of a corporation until the happening of a prescribed event, and a provision making the happening of an event a cause for declaring a forfeiture of the charter as upon condition subsequent. In the former case, the charter will expire of itself by its own limitation, but in the latter case a judicial determination of the ground of forfeiture is required before the corporation becomes dissolved.²

Thus, it has been held that, if the charter of a railroad company contains a proviso that unless the company shall begin and complete its road within a certain period of time "its

791; *Bank of Gallipolis v. Trimble*, 6 B. Monr. 601; *Asheville Division No. 15 v. Aston*, 92 N. Car. 578. Compare *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400.

As to the construction of a provision in the charter of a corporation limiting its duration, see *supra*, § 418.

¹ *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524; *Sturges v. Vanderbilt*, 78 N. Y. 384.

² In *La Grange, &c. R. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 482, McClain, J., said: "If the act of incorporation fixes a definite time in which the charter shall expire,

as, for instance, in twenty years, there can be no doubt that when that period of time expires the corporation is dissolved. But when the continuance of the corporation beyond a fixed time is made to depend upon the performance of a given condition, there can be no doubt that the non-performance of the condition is a mere ground of forfeiture. This, however, can be taken advantage of only by the State in a proceeding in the nature of a *quo warranto*, and the existence of the corporation can never be collaterally called in question." See *infra*, § 1015.

corporate existence and powers shall cease," the corporation will lose its franchises without a judgment of forfeiture, if it does not build the road within the prescribed time.¹

On the other hand, a provision in a charter fixing the time within which the corporation shall construct certain works does not of itself operate as a limitation upon the continuance of the franchises; and a failure on the part of the company to comply with the provision would be merely a ground of forfeiture by judicial proceedings.² So it has been held that, if an act of incorporation declares that in default of fulfilling a specified condition the corporation shall be dissolved, this means dissolved in the usual manner, by judicial proceedings and decree of forfeiture.³

§ 1007. *Effect of the Loss of Corporate Organization.* — It was settled at an early day, that a corporation aggregate becomes dissolved whenever, by the happening of any event or contingency, it becomes unable to continue the organization necessary to its corporate action.⁴ In *Philips v. Wickham*,⁵ Chancellor Walworth said: "If a corporation consists of several integral parts, and some of those are gone, and the remaining parts have no power to supply the deficiency, the corporation is dissolved. As in the case in *Rolle* (1 Roll. Abr. 514, I.), where the corporation was to be composed of

¹ *Matter of Brooklyn, &c. Ry.* Wend. 382. And see *Matter of Co.*, 72 N. Y. 245; 81 N. Y. 69; *Reformed Presbyterian Church, Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524; *Oakland R. R. Co. v. Oakland, &c. R. R. Co.*, 45 Cal. 365; *Sala v. City of New Orleans*, 2 Woods, 188; *Dane v. Young*, 61 Me. 160. See, however, *Briggs v. Cape Cod, &c. Canal Co.*, 187 Mass. 71; *Walamet Falls Canal, &c. Co. v. Kittridge*, 5 Sawy. 44; *Atchafalaya Bank v. Dawson*, 13 La. 497.

² *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. 1, 121-127; *State v. Fagan*, 22 La. Ann. 546.

³ *People v. Manhattan Co.*, 9

Wend. 382. And see *Matter of Co.*, 72 N. Y. 245; 81 N. Y. 69; *Reformed Presbyterian Church, Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524; *Oakland R. R. Co. v. Oakland, &c. R. R. Co.*, 45 Cal. 365; *Sala v. City of New Orleans*, 2 Woods, 188; *Dane v. Young*, 61 Me. 160. See, however, *Briggs v. Cape Cod, &c. Canal Co.*, 187 Mass. 71; *Walamet Falls Canal, &c. Co. v. Kittridge*, 5 Sawy. 44; *Atchafalaya Bank v. Dawson*, 13 La. 497.

⁴ 2 Kyd, 447. In *Rex v. Passmore*, 3 T. R. 245, Buller, J., said: "I am of opinion that, whenever a corporation is reduced to such a state as to be incapable of acting or continuing itself, it is dissolved." See *Rex v. Morris*, 4 East, 17.

⁵ *Philips v. Wickham*, 1 Paige, 596, 597; 2 Kyd, 448; *Slee v. Bloom*, 5 Johns. Ch. 377.

a certain number of brothers and a certain number of sisters, and all the sisters were dead, and it was admitted that all grants and acts done by the brothers afterwards were void; for after the sisters were dead, it was not a perfect corporation. But the case which is immediately afterwards stated by Rolle shows that, if the brothers had possessed the power of appointing other sisters in the place of those who were dead, the corporation might have been revived."

§ 1008. The rule stated in the preceding section was first applied to municipal and ecclesiastical corporations, whose organization frequently consisted of several distinct parts which could be perpetuated only according to prescribed methods. But it can have very little application to corporations organized as stock companies are in modern times, with transferable shares, and whose necessary officers and agents may be appointed by vote of the shareholders. In *Rose v. Turnpike Company*,¹ Sergeant, J., said: "Our corporations bear little resemblance to the English municipal corporations, either in design or constitution. The present, like many of our incorporations for civil purposes, either by special act of Assembly or under the act of 1791, is not a corporation composed of several integral parts. The stockholders constitute the company, and the managers and officers are their agents, necessary for the conduct and management of the affairs of the company, but not essential to its existence as such, nor forming an integral part. The corporation exists *per se* so far as is requisite to the maintenance of perpetual succession, and holding and preserving its franchises. The non-existence of the managers does not imply the non-existence of the corporation. The latter is dormant during that time; its franchises are suspended for want of the means of action; but the capacity to restore its functionaries by means of elections remains."

It may therefore be stated as a general rule, that an ordinary private corporation composed of shareholders does not lose its franchises or become legally dissolved merely by discontinuing its business, and failing to appoint officers and

¹ *Rose v. Turnpike Co.*, 3 Watts (Pa.), 48.

agents; a new organization may be brought about, and new officers be chosen, by vote of the shareholders at a duly called meeting.¹

§ 1009. *Death of Members.* — It is a self-evident proposition, that a corporation cannot exist without members or corporators to compose it. It was therefore held at an early day, that, if all the members of a corporation should die, the corporation must necessarily be dissolved. Kyd said: "That a corporation aggregate is dissolved by the death of *all* its members, is a proposition so plain that it seems ludicrous to mention it, and yet an authority has been cited in support of it."²

This rule still applies to clubs and other societies, whose members must be elected by vote of the existing members. But it has no application to a corporation whose membership is represented by shares of stock, which may be transferred by assignment or inheritance. Such a corporation can never be without members, for the shares and franchises of the several members pass by assignment, bequest, or descent, and must ever belong to some persons, who for the time will be members of the corporation.³ The decease of all the shareholders in such a corporation therefore does not terminate its existence; and it is well settled that all the shares in a cor-

¹ *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247; *State v. Barron*, 58 N. H. 370; *Lehigh Bridge Co. v. Lehigh Coal, &c. Co.*, 4 Rawle, 23; *Commonwealth v. Cullen*, 13 Pa. St. 133; *Philips v. Wickham*, 1 Paige, 590; *Slee v. Bloom*, 5 Johns. Ch. 377; 19 Johns. 456; *People v. Twaddell*, 18 Hun, 427; *Hoboken Building Ass. v. Martin*, 13 N. J. Eq. 427; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 140; *Blake v. Hinkle*, 10 Yerg. 220; *Kansas City Hotel v. Sauer*, 65 Mo. 268; *St. Louis Domicile, &c. Ass. v. Augustin*, 2 Mo. App. 123; *Smith v. Smith*, 3 Desaus. (S. Car.) 557; *Harris v. Mississippi Valley, &c. R. R. Co.*, 51 Miss. 603. While a corporation which has wound up its business is not dissolved in legal contemplation, it would ordinarily not have a right to begin the business of the company anew, as this would be a departure from the company's charter. If the majority should attempt to do so, a dissenting shareholder would ordinarily have a right to restrain them. See *supra*, § 284.

² 2 Kyd on Corp. 447, 448.

³ *Boston Glass Manufactory v. Langdon*, 24 Pick. 52; *Russell v. McLellan*, 14 Pick. 69. Compare *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. 121.

poration may be held by a single person, and yet the corporation continue to exist; and if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule.¹

§ 1010. *Insolvency does not dissolve.*—The possession of property is not essential to the existence of a corporation. Hence it is held that insolvency does not extinguish its legal existence; nor would the assignment of all of its property to pay its debts, or for any other purpose, have that effect.² In a case before the Supreme Court of Massachusetts, Chief Justice Shaw said: "The corporation, notwithstanding the proceedings in insolvency, may have assets sufficient to pay all their debts; and then no impediment would exist, before a surrender pursuant to law, or a forfeiture ascertained and declared by a proper judicial proceeding, from resuming their business. Or, if their capital is impaired or wholly gone, this seems to be no reason, before such surrender or forfeiture, to prevent the members from furnishing renewed capital, and then proceeding to use the corporate powers."³

It has been decided, accordingly, that the insolvency of a corporation and an assignment of all of its property for the benefit of creditors, or the appointment of a receiver, will not extinguish the franchises with which the company has been invested by its charter, or put an end to its corporate existence. The legal existence of a corporation can be cut short only through a forfeiture of its franchises, declared at the suit of the State granting them, or a surrender by act of the shareholders.⁴

¹ *Russell v. McLellan*, 14 Pick. 69, 70; *Newton Manuf. Co. v. White*, 42 Ga. 148; *Baldwin v. Canfield*, 26 Minn. 43. *lingshead v. Woodward*, 35 Hun, 410; *Holland v. Heyman*, 60 Ga. 174; *Valley Bank v. Ladies', &c. Sewing Soc.*, 28 Kans. 423; *Lea v. American, &c. Co.*, 3 Abb. Pr. n. s. 11; *Folger v. Columbian Ins. Co.*, 99 Mass. 276; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Huguenot Nat. Bank v. Studwell*, 6 Daly, 13; *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 530. See *Hol-*

² *Boston Glass Manufactory v. Langdon*, 24 Pick. 53, *per Morton, J.* *v. American, &c. Co.*, 3 Abb. Pr. n. s. 11; *Folger v. Columbian Ins. Co.*, 99 Mass. 276; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Huguenot Nat. Bank v. Studwell*, 6 Daly, 13; *City Ins. Co. v. Commercial Bank*, 68 Ill. 350; *Nimmons v. Tappan*, 2

³ *Coburn v. Boston Papier Maché Co.*, 10 Gray, 245.

⁴ *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 530. See *Hol-*

§ 1011. *Dissolution by Surrender of the Charter.*—The legal existence of a corporation may be terminated by a surrender of its franchises to the State which granted them.¹ It is essential to a valid and binding surrender that it be accepted by the State, and this can ordinarily be done only by an act of the legislature;² but in England the King may accept a surrender of a charter granted by himself.³

After long-continued non-user, it may be presumed that a corporation has surrendered its franchises to the State;⁴ but the mere fact that a corporation has been without officers or organization, and has performed no corporate acts, during a number of years, does not put an end to its franchises, although this may be a good ground for declaring them forfeited by judicial proceedings.⁵ Thus, it has been held that a corporation, which had sold all its assets with the intention of putting an end to its business, whose officers had all resigned, and whose stockholders had all transferred their shares to a

Sweeny, 652; Barclay v. Talman, 4 Edw. Ch. 128; De Camp v. Alward, 52 Ind. 469; State v. Bank of Maryland, 6 G. & J. 205; Bank of Bethel v. Pahquioque Bank, 14 Wall. 388, affirming National Pahquioque Bank v. First Nat. Bank, 36 Conn. 325; Green v. Walkill Nat. Bank, 7 Hun, 63; Bruffett v. Great Western R. R. Co., 25 Ill. 357; State v. Rives, 5 Ired. 309; Moseby v. Burrow, 52 Tex. 396.

¹ As to surrender by vote of the majority of the shareholders, see *supra*, § 413. See Wallamet Falls, &c. Canal Co. v. Kittridge, 5 Sawy. 44; Merchants', &c. Line v. Wagner, 71 Ala. 581.

² Town v. Bank of River Raisin, 2 Dougl. (Mich.) 538; La Grange, &c. R. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420; Wilson v. Proprietors of Central Bridge, 9 R. I. 590; Revere v. Boston Copper Co., 15 Pick. 351; Boston Glass Manufactory v. Langdon, 24 Pick. 49; Curien v. Santini, 16 La. Ann. 27; Campbell

v. Mississippi Union Bank, 6 How. (Miss.) 681; Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 45, 46; Norris v. Mayor, &c. of Smithville, 1 Swan, 164; Mechanics' Bank v. Heard, 37 Ga. 401.

³ 2 Kyd, 447.

⁴ Brandon Iron Co. v. Gleason, 24 Vt. 238; Strickland v. Prichard, 37 Vt. 324; State v. Vincennes University, 5 Ind. 77. Compare Regents of University v. Williams, 9 G. & J. 365.

⁵ Russell v. McLellan, 14 Pick. 63; Brandon Iron Co. v. Gleason, 24 Vt. 238; Knowlton v. Ackley, 8 Cush. 95; Rollins v. Clay, 33 Me. 132; Proprietors of Baptist Meeting-House v. Webb, 66 Me. 398; John v. Farmers', &c. Bank, 2 Blackf. 367; Harris v. Muskingum Manuf. Co., 4 Blackf. 268; Regents of University v. Williams, 9 G. & J. 365. Compare Cook v. Kent, 105 Mass. 246; Portland Dry Dock, &c. Co. v. Trustees of Portland, 12 B. Monr. 79.

single person, was, nevertheless, not dissolved, and that its corporate existence could be ended only by judgment of forfeiture, or by a surrender accepted by the State.¹

§ 1012. *Under the New York Statutes.*—In the case of *Slee v. Bloom*, the Court of Errors of New York decided that a manufacturing corporation organized under the act of 1811 must be considered dissolved within the meaning and intent of the act, so as to make its shareholders individually liable for its debts, after the company had suffered all of its property to be sold on execution, and had performed no corporate acts whatever for more than a year.² This decision has been followed in a number of cases, and has been held to establish the doctrine “that the suffering an act to be done which destroys the end and object for which the corporation was instituted, must be regarded as equivalent to a direct surrender.”³ But in the case of *Bradt v. Benedict*, in the Court of Appeals, Pratt, J., referring to *Slee v. Bloom*, said: “The court in that case held that, under the circumstances, the corporation might be deemed to have surrendered its franchises, and to be dissolved in fact. Whether the court did not, by that decision, rather supply what might be deemed a defect in the statute, than announce the law as it was found in the books, it is not necessary to inquire. It is enough that it has ever since been adhered to, and must now be deemed a correct construction of the act. (*Penniman v. Briggs*, Hopk. 300; s. c. in error, 8 Cow. 387.) But, in the language of Chancellor Kent, it should not be carried beyond the precise facts upon which the case rested.”⁴

¹ *Evarts v. Killingworth Manuf. Co.*, 20 Conn. 448; *Allen v. New Jersey Southern R. R. Co.*, 49 How. Pr. 14; *Rorke v. Thomas*, 56 N. Y. 559, 563; *Hollingshead v. Woodward*, 35 Hun, 410.

² *Slee v. Bloom*, 19 Johns. 456, 477. See also *Kehlor v. Lademann*, 11 Mo. App. 550.

³ *People v. Bank of Hudson*, 6 Cowen, 220. And see *Briggs v. Penniman*, 8 Cowen, 391; *Penniman v. Briggs*, Hopk. Ch. 300; *People v.*

Washington, &c. Bank, 6 Cowen, 216; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Webster v. Turner*, 12 Hun, 264; *Fullerton v. Kelliher*, 48 Mo. 543; *Carey v. Cincinnati, &c. R. R. Co.*, 5 Iowa, 367. Compare also *State Savings Ass. v. Kellogg*, 52 Mo. 533; and see *supra*, § 617.

⁴ *Bradt v. Benedict*, 17 N. Y. 99. And see *Penniman v. Briggs*, Hopk. Ch. 300, *per* Chancellor Kent; *Slee v. Bloom*, 5 Johns. Ch. 377, over-

§ 1018. *Dissolution by Legislative Enactment.* — In England, a corporation may be dissolved and deprived of its franchises by act of Parliament. But the King, though by his prerogative he can charter a corporation, cannot by his prerogative dissolve it.¹

In the United States, the franchises of a corporation cannot be impeached or revoked by a State law, on account of the provision in the Constitution against laws impairing the obligation of contracts; and hence a corporation cannot be dissolved by any act of legislation, except with the consent of the corporators, or by virtue of a reservation of the power of repeal when the franchises are granted.²

§ 1014. *Dissolution through Judicial Proceedings.* — The State may dissolve a corporation, and annul its franchises, through a judicial proceeding in which the cause of dissolution and forfeiture are adjudged, as a penalty for the doing of wrongful acts, or the non-performance of obligations assumed by the corporation in favor of the State. In *Terrett v. Taylor*,³ Justice Story said: "A *private* corporation created by the legislature may lose its franchises by a *misuser* or a *non-user* of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to

ruled in 19 Johns. 456; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Mickles v. Rochester City Bank*, 11 Paige, 118; *New York, &c. Iron Works v. Smith*, 4 Duer, 375; *People v. Northern R. R. Co.*, 53 Barb. 108; *Lake Ontario Nat. Bank v. Onondaga County Bank*, 7 Hun, 549.

¹ 2 Kyd, 447; *Lea v. American, &c. Canal*, 8 Abb. Pr. n. s. 10.

² *Infra*, Chapter XV. *Bruffett v. Great Western R. R. Co.*, 25 Ill. 353; *State v. Adams*, 44 Mo. 570.

Franchises can be withdrawn or annulled only by authority of the State granting them. The Federal government cannot annul a franchise conferred by a State within its jurisdiction, unless to accomplish

some Federal purpose. See *supra*, § 959. An adjudication of the bankruptcy of a corporation, pursuant to the United States bankruptcy laws, does not legally dissolve the corporation. *Holland v. Heyman*, 60 Ga. 174.

³ *Terrett v. Taylor*, 9 Cranch, 51; *Dartmouth College v. Woodward*, 4 Wheat. 658; *Mumma v. Potomac Co.*, 8 Pet. 281; *People v. Kingston, &c. Turnpike Co.*, 28 Wend. 205; *People v. Bristol, &c. Turnpike Co.*, 28 Wend. 222, and cases cited; *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. 1; *State Bank v. State*, 1 Blackf. 267.

ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation."

§ 1015. **Forfeiture of Franchises must be adjudicated at the Suit of the State.** — The charter of a corporation does not expire by reason of the omission or commission of acts on the part of the company, constituting a sufficient ground for declaring a forfeiture; but the franchises continue in full force until the penalty of forfeiture is claimed by the State granting the franchises; and this can be done only through a proper legal proceeding, by which the cause of forfeiture is judicially ascertained.

Thus, it was held by the Court of Appeals of New York, that a failure on the part of a railroad company to comply with provisions of the law requiring the company to build a portion of its road within a certain time, would not of itself put an end to its legal existence. Earl, J., in delivering the opinion, said: "These provisions were probably not complied with. They were conditions for a non-compliance with which the sovereign power could claim a forfeiture of the company's charter. But a cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally, or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation; and the government creating the corporation can alone institute the proceeding; and it can waive a forfeiture, and this it can do expressly, or by legislative acts recognizing the continued existence of the corporation."¹

¹ Matter of N. Y. Elevated R. R. Co., 70 N. Y. 337, 338; New Jersey Southern R. R. Co. v. Long Branch Commissioners, 39 N. J. Law, 35; Central Crosstown R. R. Co. v. Twenty-third St. R. R. Co., 54 How. Pr. 185; Baker v. Backus, 32 Ill. 79, 110; State v. Real Estate Bank, 5 Ark. 506; Importing, &c. Co. v. Locke, 50 Ala. 334; West v. Carolina Life Ins. Co., 31 Ark. 476; Dyer v. Walker, 40 Pa. St. 157; Moore v. Schoppert, 22 W. Va. 282, 290; Moseby v. Burrow, 52 Tex. 396; Toledo, &c. R. R. Co. v. Johnson, 49 Mich. 148; Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 45; Kellogg v. Union Co., 12 Conn. 7; Penobscot Boom Co. v. Lamson, 16 Me. 231; State v. Vincennes University, 5 Ind. 89; Curien v. Santini, 16 La. Ann. 27; Proprietors of Baptist Meeting-House v. Webb, 66 Me. 398; Stoops v. Greensburgh, &c.

§ 1016. **Responsibility of a Corporation for the Wrong or Neglect of its Agents.**—In considering the liability of a corporation to have its franchises declared forfeited for a non-feasance or a misfeasance, it is to be borne in mind that a corporation aggregate can ordinarily act only by agent; and that a charge of neglect or wrong brought against a corporation of that description is ordinarily based upon the neglect or wrong of its agents, and not of the body of corporators directly.

With regard to the performance of positive obligations assumed by a corporation, it would seem that the question of agency can have no application. Having assumed an obligation, the company must see to its performance, and cannot escape the consequences of a failure to carry out its undertaking by alleging the neglect of the agents appointed by it.¹

The responsibility of a corporation for *wrongs* committed by its agents rests on other grounds. It is a general rule of the law of agency, that a principal is liable for torts committed by his agents, within the scope of their employment. But it has never been held that a principal is liable for all the torts of his agents, under all circumstances, and it would be wholly unreasonable to apply such a rule to a corporation. It may be fair to punish a corporation by annulling its franchises and dissolving it, on account of wrongs committed by the majority, or by the managing agents to whom the company has confided the care and control of all of its affairs;² but it would not be just to punish the company on account of wrongful acts committed by its inferior agents, without the company's knowledge or consent.³

Plank Road Co., 10 Ind. 47; Hartsville University v. Hamilton, 84 Ind. 506; Commonwealth v. Union Fire, &c. Ins. Co., 5 Mass. 280; Heard v. Talbot, 7 Gray, 119, 120; Bache v. Nashville, &c. Society, 10 Lea (Tenn.), 486; State v. White's Creek Turnpike Co., 8 Tenn. Ch. 168; State v. Paterson, &c. Turnpike Co., 21 N. J. Law, 9; Commonwealth v. Allegheny Bridge Co., 20 Pa. St. 185; Murphy v. Farmers'

Bank, 20 Pa. St. 415; Bank of U. S. v. Commonwealth, 17 Pa. St. 407, 408; Bohannon v. Binns, 81 Miss. 355; Gaylord v. Fort Wayne, &c. R. R. Co., 6 Biss. 286.

¹ See *infra*, § 1017 *et seq.* But compare State v. Pawtuxet Turnpike Co., 8 R. I. 189, 190.

² State Bank v. State, 1 Blackf. (Ind.) 275-277.

³ See *infra*, § 1023.

§ 1017. **Non-performance of Obligations to the State.** — The principles of law upon which the liability of a corporation for the non-performance of its duties rests, were explained by Chief Justice Nelson in the case of *People v. The Kingston and Middletown Turnpike Company*,¹ in the following words: "Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court. The powers and privileges are conferred and the conditions enjoined upon them; they obtain the grant, and engage to perform the conditions; and when charged with a breach, I do not perceive any reason against holding them accountable upon principles applicable to an individual to whom valuable grants have been made upon conditions precedent or subsequent. As to him, performance is indispensable to the vesting or continued engagement. If a feoffment be made of lands upon condition of paying rent, building a house, or planting an orchard, and a failure to perform, the feoffor may enter. So, if an office be granted, a condition is implied that the party shall faithfully execute it, and for neglect the grantor may discharge him. Placing corporate grants upon this footing, there can be no great difficulty in ascertaining the principles that should govern conditions annexed to them. The analogous cases of individual conditional grants will give the rule."

§ 1018. **Obligations assumed for the Benefit of the Public.** — It has accordingly been held in various cases, that, if a corporation has assumed the performance of duties for the benefit of the public generally, it cannot neglect the performance of these duties without incurring a forfeiture of its franchises.

Thus, it is the duty of a corporation chartered to build a turnpike road to maintain its road in repair as a thoroughfare for the public use. And therefore, if a turnpike company should fail to keep its road in proper condition to be used by the public, it would be liable to have its franchises declared forfeited at the suit of the State.² The same rule

¹ *People v. Kingston, &c. Turnpike Co.*, 23 Wend. 193. 205-218. 8 R. I. 182, 191; *People v. Fishkill, &c. Plank Road Co.*, 27 Barb. 452,

² *State v. Pawtuxet Turnpike Co.*, 458; *People v. Hillsdale, &c. Turn-*

undoubtedly applies to other corporations of a similar character, such as ferry and bridge companies, canal companies, gas companies, telegraph companies, and railroad companies.¹

§ 1019. *Neglect of Duties imposed in express Terms.* — If a duty is prescribed by the charter of a corporation in express terms, it seems that the company will hold its franchises upon condition that the duty shall be performed; and hence an omission to perform will constitute a sufficient ground for declaring a forfeiture of the company's franchises.

Thus, it was considered by the Supreme Court of North Carolina, that the failure of a railroad company to comply with a provision in its charter requiring the president and directors of the company to make an annual statement of its income and return the same to the General Assembly, in order to enable the latter to regulate the tolls charged by the company, was a cause for declaring the charter forfeited.¹ Chief Justice Ruffin, delivering the opinion of the court, said: "We entertain no doubt that the omission of an express duty prescribed by a charter to a corporation is cause of forfeiture. Its performance is in the nature of a condition, and the sovereign may insist on resuming his grant for the breach of the condition. With respect to the duties arising by implication from the nature of the franchise granted, and the interest of the public in their due and continued performance, we should be inclined to hold that only such acts or omissions would be destructive of the charter as concern matters which are of the essence of the contract between the State and the corporation; when the corporation fails to do that which it must be seen it was intended and expected it would do, or does that which, it is certain, it was intended

pike Co., 28 Wend. 254; *People v. provement Co.*, 103 Ill. 491, 507; *Plymouth Plank Road Co.*, 82 Mich. 248; *People v. Jackson, &c. Plank Co.*, 11 Neb. 354. See *infra*, *Road Co.*, 9 Mich. 285; *State v. Chapter XVI.*
Royalton, &c. Turnpike Co., 11 ² *Atty.-Gen. v. Petersburg, &c. Vt.* 481; *Turnpike Co. v. State, R. R. Co.*, 6 Ired. L. 456. Compare *State v. Pawtuxet Turnpike Co.*, 8 R. I. 189, 190; *State v. Barron*, Gray, 180. 58 N. H. 370.

¹ *People v. Kankakee River Im-*

and expected it would not do. But when a charter, as here, expressly imposes a duty which the company is to perform, not merely to the citizen, but to the sovereign itself, although it may not declare that non-performance shall make a forfeiture, yet by no latitude of equitable interpretation can it be regarded as a hard bargain, and as such relieved against in a court of law; but it must be taken to have been required by the State as a material stipulation, for the non-performance of which by the corporation the State may put an end to the contract."¹

§ 1020. But not every positive provision in the charter of a corporation imposes a duty which must be performed by the company at the peril of forfeiting its franchises. Provisions are frequently inserted in charters of incorporation merely to regulate the internal management of the companies, and to define the powers of their agents, but not for the purpose of imposing obligations upon the companies themselves.²

Thus, it was held by the Supreme Court of Mississippi, that a clause in the charter of a bank providing that, "should any stockholder refuse or fail to pay any instalment on his stock when called for, the company shall sell said stock, on giving thirty days' notice in some gazette, on account of and at the risk of the stockholders," did not impose a duty upon the corporation to sell the stock of delinquent shareholders; but that the power to sell was for the benefit of the corporation only, and hence a failure to sell was no cause of forfeiture. Chief Justice Sharkey said: "In the construction of charters, a distinction must be observed between those provisions which are intended to apply merely to the internal government of the corporation, and those which impose positive conditions, restrictions, or duties in which the public interest is involved. For a violation of the latter a forfeiture occurs, but not so with regard to the former."³

¹ 6 Ired. L. 469. And see also, *Bridge v. Warren Bridge*, 7 Pick. 844, 371.

Nelson, in *People v. Kingston, &c.*

Turnpike Co., 28 Wend. 208-210;

People v. Bristol, &c. Turnpike Co., 28 Wend. 222. See *Charles River*

² See *supra*, § 672 *et seq.*

³ *Commercial Bank of Natchez*

v. State, 6 Sm. & M. 617.

Upon the same principle, it was held in the North Carolina case cited in the preceding section, that a failure to comply with a provision in the charter of a company requiring the president and directors to declare semiannually such dividends of the net profits as they may deem advisable, was not a cause of forfeiture. The court said: "It is clear that that part of the charter is not inserted for the advantage of the State, or to protect the State from detriment, either from an accumulation of capital or a misapplication of profits, but solely for the benefit of the stockholders."¹

§ 1021. *Duties imposed for Reasons of Public Policy.* — There are certain classes of duties which are imposed upon corporations by the express or implied terms of their charters, for reasons of general public policy, though not for the benefit of the public directly; and a failure to perform such duties may be a good ground of forfeiture.

Thus, it was held by the Supreme Court of Wisconsin, that it was the duty of a railroad company "to keep its principal place of business, its books and records, and its principal officers, within the State, to an extent necessary to the fullest jurisdiction and visitatorial power of the State and its courts, and the efficient exercise thereof in all proper cases which concern said corporation"; and that a total neglect of this duty would justify and demand a judgment of forfeiture of the franchises of the company.²

§ 1022. *Dissolution for unauthorized Exercise of Franchises.* — The franchise of acting in a corporate capacity cannot be assumed without the permission of the State; and if a company attempts to exercise this franchise without having authority, it may be prevented from doing so, and dissolved by the State through a proceeding of *quo warranto*.³ Hence, also, where conditions precedent to the legal existence of a corporation have not been complied with, a *quo warranto* is the

¹ Atty.-Gen. v. Petersburg, &c. R. R. Co., 6 Ired. 474; and see State v. Pawtuxet Turnpike Co., 3 R. I. 189.

² State v. Milwaukee, &c. Ry. Co., 45 Wis. 590.

³ State v. Bradford, 32 Vt. 50; State v. Central Ohio, &c. Relief Ass., 29 Ohio St. 399.

proper remedy by which the unauthorized exercise of corporate powers may be stopped. The same rule applies where a charter of incorporation has been obtained by a fraud upon the legislature.¹

§ 1023. *Non-performance of Conditions Subsequent.* — A charter of incorporation may be granted upon the express condition that the corporation formed under it shall perform some act within a prescribed time after having become incorporated; and a failure to comply with the prescribed condition may cause a cessation of the company's franchises, and subject it to a judgment of dissolution. Thus, if the charter of a corporation provides that its capital must be paid in, or that its works must be constructed, within a certain time after the time of incorporation, a failure to comply with the prescribed condition will be a sufficient ground for declaring a forfeiture.²

§ 1024. *Forfeiture for Misfeasance.* — A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter or by a general rule of law, and, strictly, every act which the charter does not expressly or impliedly authorize the corporation to perform, is unlawful;³ and if the doing of such act is an injury to the public, it may be sufficient ground for declaring a forfeiture of the corporate franchises.⁴

Thus, a judgment of *ouster* was rendered by the Supreme Court of New York against an insurance company which had undertaken to carry on banking operations without authority, and in violation of a general law restraining unauthorized banking.⁵ And it was held by the Supreme Court of Pennsylvania, that, where a bank was prohibited by its charter from making loans at a greater rate of discount than one half of one per cent for thirty days, and from dealing in prom-

¹ *Charles River Bridge Co. v. Warren Bridge Co.*, 7 Pick. 371; *State v. Bailey*, 16 Ind. 46; *Centre, &c. Turnpike Co. v. McConaby*, 16 S. & R. 145. Compare *State v. Beck*, 81 Ind. 501; *State v. Kingan*, 51 Ind. 142.

² *People v. City Bank*, 7 Col. 226.

Compare *supra*, § 31.

³ *Supra*, § 648 *et seq.*

⁴ *People v. Dispensary, &c. Soc.*, 7 Lans. 304; and cases *infra*.

⁵ *People v. Utica Ins. Co.*, 15 Johns. 353.

issory notes, and it was shown that this provision had been wilfully and repeatedly violated, this was sufficient to establish a cause for declaring the charter forfeited.¹ Chief Justice Lewis said: "It may be affirmed as a general principle, that where there has been a misuser, or a non-user, in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture."²

§ 1025. *Forfeiture for Nonfeasance.* — There can be no doubt that, if a corporation neglects the performance of any duty or obligation which it has assumed for the benefit of the public, this is a sufficient cause for declaring a forfeiture of the company's franchises. But all corporations are not under a positive obligation to the State to carry on the business for which they were formed. Thus, ordinary private business companies may at any time put an end to the whole or a part of their transactions, and voluntarily wind up their affairs. Their franchise of acting in a corporate capacity is merely permissive, and not an obligation. Hence in these cases a forfeiture for non-user of the franchises cannot be based upon a neglect of duty on the part of the company.³

¹ *Commonwealth v. Commercial Bank*, 28 Pa. St. 383, 391. See *State v. Commercial Bank of Manchester*, 33 Miss. 474.

² 28 Pa. St. 389. See also *State Bank v. State*, 1 Blackf. (Ind.) 267; *People v. Phoenix Bank*, 24 Wend. 431; *Commonwealth v. Union Fire, &c. Ins. Co.*, 5 Mass. 230; *People v. Hillsdale, &c. Turnpike Co.*, 2 Johns. 190; *State v. Standard Life Ass.*, 38 Ohio St. 281; *State v. Railway Co.*, 40 Ohio St. 504.

In *State v. Commercial Bank of Cincinnati*, 10 Ohio, 540, the court held that a contract to charge a higher rate of interest than was permitted by the charter would not

be a cause of forfeiture, *because* the contract was illegal, and therefore wholly void; — a very remarkable decision. See *contra*, *State v. Commercial Bank of Manchester*, 33 Miss. 474. A corporation does not incur a forfeiture of its franchises by reason of an intention merely to do unauthorized acts, although it be manifested by acts. *Commonwealth v. Pittsburg, &c. R. R. Co.*, 58 Pa. St. 26. Compare *Re Franklin Tel. Co.*, 119 Mass. 447.

³ *People v. Bristol, &c. Turnpike Co.*, 28 Wend. 237, *per* Cowen, J.; *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. 107, *per* Buchanan, C. J.

§ 1026. **Loss of Right to continue Business.—Insolvency.**—If a corporation has come to such a condition that it has no legal right to continue its business or operations under any circumstances, the State may dissolve it through legal proceedings, and obtain a judgment expressly declaring its franchises to be ended. The corporation itself cannot suffer by this; and it would be a protection to the community against any attempt to use the charter for unauthorized purposes at any subsequent time.¹ Certainly, if a corporation fails to stop its operations and to wind up its business when it becomes its legal duty to do so, the State may dissolve it, and wind up its business through legal proceedings. Thus, if a banking, insurance, or trading company has become wholly insolvent, or incapable, for other reasons, to continue its business with safety to its creditors or to the public, it is its legal duty to cease carrying on business, and to wind up its affairs;² and a failure to comply with this duty may be punished by a compulsory dissolution at the suit of the State.³

§ 1027. **Suspension of Payments by Banks.**—Any general suspension of payments by a bank, or the refusal to redeem its notes and pay depositors, is a sufficient ground for a judgment of forfeiture and dissolution.⁴ But it seems that a merely temporary suspension of payments, when not wilful, is not a sufficient cause.⁵

A provision in the charter of a bank, imposing a penalty for a suspension of payments by the bank, does not deprive

¹ See *State v. Commercial Bank of Manchester*, 38 Miss. 474; s. c. Ohio St. 176; *People v. Bank of Hudson*, 6 Cow. 219.

21 Miss. 569; *State v. Pipher*, 28 Kans. 127; *People v. Bristol, &c. Turnpike Co.*, 23 Wend. 236; and cases in the following notes.

² *Supra*, § 412.

³ See *Ward v. Farwell*, 97 Ill. 594; *Chicago Life Ins. Co. v. Needles*, 118 U. S. 574; *People v. Globe Mut. Life Ins. Co.*, 60 How. Pr. 82; *Atty.-Gen. v. Atlantic Mut. Life Ins. Co.*, 77 N. Y. 336; *State v. Real Estate Bank*, 5 Ark. 596-607; *State v. Seneca County Bank*, 5

⁴ *State v. Bank of South Carolina*, 1 Spears (S. Car.), 433, 451, 466; *Commercial Bank of Natchez v. State*, 6 Sm. & M. 617-623; *Planters' Bank of Mississippi v. State*, 7 Sm. & M. 163; *State v. Real Estate Bank*, 5 Ark. 596. Compare *People v. Washington, &c. Bank*, 6 Cow. 216; *People v. Bank of Hudson, Id.* 219; *State v. Bailey*, 16 Ind. 51.

⁵ *Commercial Bank of Natchez v. State*, 6 Sm. & M. 617-623.

the State of the right to a judgment of forfeiture and dissolution on account of a suspension of payments.

Thus, it was held by the Supreme Court of Mississippi, that, although the charter of a bank contained a provision that upon failure to pay its notes on presentation they should bear interest at the rate of twelve and a half per cent per annum, this would not prevent the State from proceeding against the company for a forfeiture of its franchises. Chief Justice Sharkey said: "The charter contains no direct authority for suspension, but it is said to be authorized, or at least excused, by that provision which gives to the note-holder a right to demand twelve and a half per cent per annum on notes that the bank refused to pay. This is believed to be a misapprehension of the effect of this provision. It furnishes no implied authority for the suspension of specie payments; it is but an indemnity for the note-holder; it looked to nothing else but the rights of individuals, or, if it did, the design was to compel the bank to do its duty. Viewed in this light, it would be strange reasoning to say that the means employed to coerce the discharge of a duty constitute a good excuse for the breach; that the penalty imposed legalizes the offence. The question of forfeiture is between the State and the bank; the question of interest is between the individual and the bank. If the mere claim of interest, or the right to demand it, will excuse the suspension, it may be continued for an indefinite time, and, although the bank might in this way defeat the great object of its creation, a forfeiture could not be enforced."¹

§ 1028. *What is a sufficient Wrong or Neglect of Duty to cause a Forfeiture.*—A corporation is not responsible for every wrong committed in its name. In order to declare a forfeit-

¹ *Commercial Bank of Natchez v. State*, 6 Sm. & M. 599, 618. And see *Thompson v. People*, 28 Wend. 538; *Washington, & Co. Turapike Co. v. Maryland*, 19 Md. 289; *Baker v. Backus*, 32 Ill. 79, 109; *State Bank v. State*, 1 Blackf. 275, 276; *State v. New Orleans Gas Light, & Co.*, 2 Rob. (La.) 533. But compare *State v. Commercial Bank*, 10 Ohio, 538; *Commonwealth v. Breed*, 4 Pick. 460; *People v. Washington, & Co. Bank*, 6 Cow. 215; *Livingston v. Bank of New York*, 28 Barb. 306; *State v. Tombeckee Bank*, 2 Stew. (Ala.) 80.

ure of the franchises of a company on account of wrongful acts performed by an agent, it must be shown that the agent acted within the scope of his authority, or that his acts were afterwards ratified; otherwise, the company itself will not be chargeable with the agent's acts.¹ Mere accidental negligence, or a single excess of authority, will not be considered a sufficient cause; but in order to warrant a judgment of forfeiture, it must appear that the wrong was wilful or long continued, so as to come to the notice of the company.²

Moreover, the wrong itself must be of sufficient importance to require the application of the severe remedy by judgment of forfeiture, for the benefit of the public. Courts may exercise their discretion in deciding whether a corporation ought to be dissolved for doing unauthorized acts.³ The rule was stated, in a learned opinion by Justice Cowen, as follows: "To work a forfeiture, there should be something wrong; and not only a wrong, but one arising from wilful abuse or improper neglect. An inability, through misfortune, to answer the design for which the body politic was instituted, is also cause of forfeiture. That, however, is on a distinct reason, not so directly material, and of which it is not necessary to say much. The prosecution before us goes on corporate default or corporate wrong, which must, I think,

¹ *State v. Pawtuxet Turnpike Co.*, 8 R. I. 190; *State v. Commercial Bank*, 6 Sm. & M. 238.

² See *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *State v. Columbia, &c. Turnpike Co.*, 2 Sneed, 254; *State v. Merchants' Ins., &c. Co.*, 8 Humph. 254; *State v. Real Estate Bank*, 5 Ark. 596; *Harris v. Mississippi Valley, &c. R. R. Co.*, 51 Miss. 602; *State v. Urbana, &c. Ins. Co.*, 14 Ohio, 6; *State v. Société Républicaine*, 9 Mo. App. 114.

³ *State v. Essex Bank*, 8 Vt. 489; and see cases referred to in the preceding note.

In *State v. Oberlin Building, &c. Ass.*, 35 Ohio St. 258, the Supreme Court of Ohio said: "Where a corporation has been guilty of acts which, by statute, are made a cause of forfeiture of its franchise to be a corporation, this court has no discretion to refuse such judgment. But, in other cases, we are vested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted from the exercise of the powers illegally assumed." See also *State v. People's Mut. Benefit Ass.*, 42 Ohio St. 579.

be more than accidental negligence, or a mere mistaken excess of power, or a mistake in the mode of exercising an acknowledged power. There must be an abuse of trust somewhat of such a nature as would render a trustee liable to forfeit his station, on the complaint of his *cestui que trust*, if the question stood on the relation between them. Corporations are political trustees. Have they fulfilled the purposes of their trust, or acted in good faith with a view to their fulfilment, is the question to be asked, when they are called on to forfeit their charters, either for acts of commission or omission; unless, indeed, they are so generally crippled and broken down in their affairs, as, in the judgment of a court and jury, to be incapable of prosecuting their business with safety to that community who granted the charter, and who hold the relation of *cestui que trust*.”¹

A corporation must perform all duties imposed by its charter, on pain of forfeiting its franchises; but a substantial performance according to the intent of the grant is all that is required.

§ 1029. *Waiver of Forfeiture.* — It is clear that the State is under no obligation to a corporation to insist upon a forfeiture of its franchises. If the State merely neglects to institute proceedings against the company, the latter will continue to hold its franchises until the State may choose to enforce a dissolution; but by an express waiver the State may lose all right to insist upon a particular cause of forfeiture at any future time.

A waiver of the right to declare a charter forfeited is not a grant of a new franchise or right to the corporation; but it is a surrender on the part of the State of a right reserved to itself. Hence it was held by the Court of Appeals of New York that an act of the legislature, waiving the right to declare the charter of a railroad company forfeited, was not in violation of a constitutional prohibition against private or local bills, or laws conferring exclusive franchises, or the

¹ *People v. Bristol, &c. Turnpike* Id. 206, *per* Nelson, C. J.; *State Co.*, 23 Wend. 286, 287; *People v. Pawtuxet Turnpike Co.*, 8 R. I. v. *Kingston, &c. Turnpike Co.*, 188.

right to lay down railroad tracks, upon any corporation. Earl, J., said: "A bill may be passed waiving a forfeiture of corporate rights. Such a bill would confer no new rights upon the corporation, but would simply be a surrender or waiver by the sovereign of its right to claim the forfeiture."¹

A grant of new franchises to a corporation is clearly a waiver which will debar the State from proceeding against the company on account of any prior forfeiture. And it seems that any act of the legislature imposing new obligations upon a corporation, or showing an intention on the part of the State that the corporation shall continue in existence, will be considered an absolute waiver of any existing right to enforce a forfeiture of the company's franchises.²

§ 1030. *Modes of enforcing a Forfeiture and Dissolution.* — The mode of proceeding against a corporation, to enforce a forfeiture of its franchises at common law, is by *scire facias*, or by writ of *quo warranto*, or by an information in the nature of *quo warranto*. It was said by Justice Ashurst: "A *scire facias* is proper where there is a legal existing body capable of acting, but who have been guilty of an abuse

¹ Matter of New York Elevated Godwinsville, &c. Road Co., 44 R. R. Co., 70 N. Y. 338; *infra*, N. J. Law, 496.
§ 1038.

² People v. Manhattan Co., 9 Wend. 380; Atty-Gen. v. Petersburg, &c. R. R. Co., 6 Ired. 470; People v. Fishkill, &c. Plank Road Co., 27 Barb. 460; Central Crosstown R. R. Co. v. Twenty-third St. R. R. Co., 54 How. Pr. 186; State v. Fourth N. H. Turnpike Co., 15 N. H. 162; Lumpkin v. Jones, 1 Ga. 30; Atchafalaya Bank v. Dawson, 13 La. 497; Commercial Bank of Natchez v. State, 6 Sm. & M. 623; La Grange, &c. R. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420; White's Creek Turnpike Co. v. Davidson County, 8 Tenn. Ch. 396; Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co., 4 G. & J. 127; *In re Mechanics' Society*, 31 La. Ann. 627; State v.

But there must be a reasonable ground for presuming that the legislature intended a waiver of the default. People v. Kingston, &c. Turnpike Co., 28 Wend. 193. Ordinarily it is only the legislature which has authority to waive a forfeiture on behalf of the State. People v. Phoenix Bank, 24 Wend. 431. As to whether acquiescence and waiver by the State may be established by merely showing lapse of time, see People v. Oakland County Bank, 1 Dougl. (Mich.) 282; Atty-Gen. v. Delaware, &c. R. R. Co., 27 N. J. Eq. 1; s. c. on appeal, Id. 631; Atty-Gen. v. Eastlake, 11 Hare, 228; Atty-Gen. v. Christ's Hosp., 3 M. & K. 344; Atty-Gen. v. Beverley, 6 De G., M. & G. 268.

of the power intrusted to them ; for, as a delinquency is imputed to them, they ought not to be condemned unheard ; but that does not apply to the case of a non-existing body. And a *quo warranto* is necessary where there is a corporate body *de facto*, who take upon themselves to act as a body corporate, but, from some defect in their constitution, they cannot legally use the powers they affect to use." ¹

In America the ancient writ of *quo warranto* has become practically obsolete ; and it is held that an information in the nature of a *quo warranto* will lie, both against corporations having a legal existence for a forfeiture of their franchises, and against such bodies as assume to exercise corporate powers without any authority whatsoever.²

If a corporation violates a special franchise, the State may obtain a judgment declaring that particular franchise forfeited, without dissolving the company, or depriving it of the general franchise of acting in a corporate capacity.³

§ 1081. *Consequences of Dissolution in Respect of Legal, as distinguished from Equitable Rights.* — The dissolution of a corporation, at common law, not only means that the company has lost its franchises and can no longer *act* in a corporate capacity, but it implies that the corporation has wholly ceased

¹ *Rex v. Pasmore*, 3 T. R. 244 ; Grant on Corporations, 301, 302.

² Upon the subject of *quo warranto* see Angell & Ames on Corporations, §§ 731-765, 778 ; High's Extraordinary Legal Remedies, §§ 591-761 ; *State v. Real Estate Bank*, 5 Ark. 596.

An information in the nature of a *quo warranto* against a corporation is in substance and effect a civil proceeding, although criminal in form ; such a proceeding may therefore be removed from a State court into the United States Circuit Court under the act of March 3, 1875, if a Federal question is involved. *Ames v. Kansas*, 111 U. S. 449.

It has been held that, if a corpo-

ration is charged in an information *as a corporation and by name*, its legal existence is thereby admitted, and the non-performance of conditions precedent cannot be inquired into. *Commercial Bank of Natchez v. State*, 6 Sm. & M. 614, 615 ; *State v. Commercial Bank of Manchester*, 33 Miss. 474 ; *People v. Rensselaer, &c. R. R. Co.*, 15 Wend. 113 ; *State v. Cincinnati Gas Light, &c. Co.*, 18 Ohio St. 262. But see *contra*, *People v. Bank of Hudson*, 6 Cow. 217. No valid reason is apparent upon which this doctrine can be based.

³ *Toledo, &c. R. R. Co. v. Johnson*, 49 Mich. 148.

to exist, in legal contemplation, and will not be recognized as a corporate body for any purpose.

It follows, that suits brought by or against a corporation are abated by its dissolution; and a judgment purporting to be rendered against a corporation which is not in existence is a nullity.¹

Hence it follows, also, that the title of a corporation to property owned by it ceases when the corporation itself ceases to exist; and it was therefore held, at common law, that, upon the dissolution of a corporation, its real estate would revert to the original owners, and the personal estate escheat to the King.² All *legal* remedies to enforce debts due by or to a corporation are necessarily extinguished when the corporation ceases to exist in legal contemplation.³

¹ *National Bank v. Colby*, 21 Wall. 614, 615; *Greeley v. Smith*, 8 Story, 658; *Mumma v. Potomac Co.*, 8 Pet. 281; *Dobson v. Simonton*, 86 N. Car. 492; *City Ins. Co. v. Commercial Bank*, 68 Ill. 350; *Merrill v. Suffolk Bank*, 31 Me. 57; *Paschall v. Whitsett*, 11 Ala. 472; *Salt-marsh v. Planters', &c. Bank*, 17 Ala. 761; *Farmers', &c. Bank v. Little*, 8 W. & S. 207; *Bank of Mississippi v. Wrenn*, 3 Sm. & M. 791; *Bank of Louisiana v. Wilson*, 19 La. Ann. 1; *May v. State Bank*, 2 Rob. (Va.) 56; *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32; *Muscatine Turnverein v. Funck*, 18 Iowa, 473; *Miami Exporting Co. v. Gano*, 13 Ohio, 269. Compare *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337; *Lindell v. Benton*, 6 Mo. 361; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 287; *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499; *Grand Gulf Bank v. Jeffers*, 12 Sm. & M. 486; *Grand Gulf Bank v. Wood*, Id. 482. See also *supra*, §§ 750-754.

In *Platt v. Archer*, 9 Blatchf. 559, it was decided that the dissolution of a corporation by judgment of a

State court would not abate proceedings in bankruptcy against the corporation, pending at the time the judgment was rendered. Compare *Hart v. Boston, &c. R. R. Co.*, 40 Conn. 524.

It seems that a corporation may be enjoined by a Federal court from taking steps to procure its own dissolution in order to defeat legal proceedings instituted against it. *Fisk v. Union Pacific R. R. Co.*, 10 Blatchf. 518.

² *Mayor of Colchester v. Seaber*, 3 Burr. 1868, *per* Lord Mansfield; *Rex v. Pasmore*, 3 T. R. 199; *State Bank v. State*, 1 Blackf. (Ind.) 280, 283; *White v. Campbell*, 5 Humph. 38; *Nevitt v. Bank of Port Gibson*, 6 Sm. & M. 533-535, and cases cited by Justice Thatcher; 1 Bl. Com. 484.

It is said in *Kyd on Corporations* (vol. ii. p. 516), "What becomes of the personal estate is, perhaps, not decided; but probably it vests in the Crown."

³ *Mayor of Colchester v. Seaber*, 3 Burr. 1866; *Rex v. Pasmore*, 3 T. R. 242; *Hightower v. Thornton*, 6 Ga. 486; *Commercial Bank of*

But it is only when the *legal* right or title is in the corporation at the time of its dissolution that an extinguishment or reverter of the *legal* right or title takes place. If real or personal property or negotiable contracts are conveyed to a corporation, subject to no condition, the company has the right to transfer the same absolutely: and in such case the title of a purchaser will not be affected by a subsequent dissolution of the corporation.¹

§ 1082. *Consequences of a Dissolution in Equity. — Rights of Shareholders.* — The rule that, when a corporation is dissolved, its debts become extinguished and its property reverts to the owner or escheats to the Crown, is merely a rule of the common law, which recognizes only the *legal* right or title. It may be doubted whether it was ever the law that equitable rights to property held by a corporation were lost by a dissolution of the company. The doctrine that the property of a dissolved corporation belongs to the King or to the original donors, was first applied in case of ecclesiastical and municipal corporations. In these cases there were no shareholders, and seldom creditors; the property was in reality without an owner, after the particular use for which it had been given had come to an end by the dissolution of the corporation.² But modern business companies differ essentially from ecclesiastical and municipal corporations, both in purpose and organization. The shareholders or corporators in an ordinary business company are themselves the donors of its property; each member contributes his share of the capital for the common benefit of all; and the corporation itself holds the property given it merely as trustee for its shareholders.³

Natchez v. Chambers, 8 Sm. & M. 9; of *Salem v. Caldwell*, 16 Ind. 469; *Port Gibson v. Moore*, 13 Sm. & M. 157; *Fox v. Horah*, 1 Ired. Eq. 358; 12 Barb. 460; on appeal, 12 N. Y. Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8; *Ingraham v. Terry*, 819; and see *People v. California College*, 38 Cal. 166.

6 Jones, Eq. 345; 1 Bl. Com. 484.

² See *People v. California College*,

¹ *State v. Rives*, 5 Ired. L. 297; 38 Cal. 166.

Owen v. Smith, 31 Barb. 641; Bank

³ *Supra*, Chapters III. and V.

Equity clearly demands that the property of a corporation of this nature should revert to the shareholders, the original donors, or their assignees, when the trust for which it was granted fails. The fact that the legal title of a corporation to property held by it becomes extinguished by a dissolution, is no reason why the beneficial owners should lose their rights. If a man dies, holding property in trust, the trust does not abate; but a court of chancery will protect and enforce the rights of the beneficiaries into whose hands the property may fall by devise or inheritance. Equity will always protect the rights of a *cestui que trust*, without regard to the strictly legal title;¹ and therefore, when a corporation is dissolved, a court of equity will recognize and protect the equitable rights of the shareholders, for whom the corporate body, as recognized by law, was merely a representative or trustee; and the assets of the dissolved corporation will be treated in equity as a trust fund belonging to the shareholders of the company, subject to the rights of its creditors.²

§ 1033. *Forfeiture of Franchises does not include Forfeiture of Property.* — The judgment rendered in a proceeding of *scire facias*, or an information in the nature of a *quo warranto*, against a corporation, can reach only the corporate franchises: these may be declared extinguished; but prop-

¹ "It is a rule in equity, which admits of no exception, that a court of equity never wants a trustee." 2 Story's Eq. Jur. §§ 976, 1050 *et seq.*

In *Atty.-Gen. v. Lady Downing*, Wilm. 22, Lord Chief Justice Wilmot said: "I take it to be a first and fundamental principle in equity that the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for valuable consideration without notice." *Lewin on Trusts* (6th ed.), 678.

² *Bacon v. Robertson*, 18 How. 480, 486; *Lum v. Robertson*, 6 Wall. 277; *Frothingham v. Barney*, 6

Hun, 366; *Matter of Woven Tape Skirt Co.*, 8 Hun, 508; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211; *Krebs v. Carlisle Bank*, 2 Wall. Jr. 33. *Contra, semble*, *Hopkins v. Whitesides*, 1 Head, 31.

Stock in a corporation ceases to be negotiable after a dissolution, and only the equitable rights of the holder can be transferred. *James v. Woodruff*, 10 Paige, 541; *s. c.* affirmed, 2 Denio, 574.

There are some clearly erroneous decisions to the contrary. See *Bank of Mississippi v. Duncan*, 56 Miss. 166; *Coulter v. Robertson*, 24 Miss. 278.

erty rights cannot be confiscated by the State, or prevented from devolving according to the ordinary rules of equity and the common law.¹

§ 1034. *Debts due the Company are not lost.* — It is frequently said that debts due to or from a corporation become extinguished by its dissolution; but this is not strictly accurate. The obligation of the debt remains, although the remedy in the name of the corporation be lost; — not by any implied condition in the contract creating the debt, but from necessity, because there is no person existing in legal contemplation in whose favor or against whom the debt can be enforced.²

It should be remembered, however, that a corporation, considered apart from its shareholders, is a mere fiction; and that debts due a corporation are in reality due the body of shareholders under the corporate name. When the fiction of a corporate existence comes to an end, all remedy *at law* is lost; for at law the rights of the individual shareholders are not recognized. But in such case a court of equity will furnish a remedy to compel the payment of debts due the company, either at the suit of the shareholders or at the suit of creditors having claims upon the corporate estate.³ And if a corporation has made an assignment of all of its assets to a trustee, for the benefit of its shareholders and creditors, such trustee may, after the dissolution of the company, institute proceedings in equity to compel the payment of debts constituting part of the corporate estate.⁴

¹ *Bacon v. Robertson*, 18 How. 486; *Curran v. State*, 15 How. 304; *State Bank v. State*, 1 Blackf. 267; *Commercial Bank of Natchez v. Chambers*, 8 Sm. & M. 52, 53; *Rowland v. Meader Furniture Co.*, 38 Ohio St. 270. See *infra*, § 1104.

² *Commercial Bank of Natchez v. Chambers*, 8 Sm. & M. 47; *Moultrie v. Smiley*, 16 Ga. 300. See *infra*, § 1036.

³ *Hightower v. Thornton*, 8 Ga. 486. The dissolution of a corpora-

tion does not discharge sureties for debts due by the company; nor are shareholders or officers freed from a secondary liability imposed by statute. *Moultrie v. Smiley*, 16 Ga. 289.

⁴ *Lenox v. Roberts*, 2 Wheat. 378; *Curran v. State*, 15 How. 311; *Lum v. Robertson*, 6 Wall. 277; *Bacon v. Cohea*, 12 Sm. & M. 516. Compare *Fox v. Horah*, 1 Ired. Eq. 362; *Von Glahn v. De Rosset*, 81 N. Car. 467.

§ 1085. **Rights of Creditors after a Dissolution.**—It is well settled that the equitable rights of the creditors of a corporation survive its dissolution, although their remedy at law is extinguished; and that a court of chancery will furnish a remedy to protect and enforce their equitable rights against any assets belonging to the company at the time of its dissolution.

Thus, it was held by the Supreme Court of the United States in *Curran v. State of Arkansas*, that power to repeal the charter of a corporation, in which the State was the sole shareholder, gave the State no constitutional power to appropriate the corporate property to the exclusion of creditors, or to deprive the latter of all legal remedy. Justice Curtis said: "If it be once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors, it follows that a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by dissolution of the corporation the legal title to its property had been changed. . . . Whatever technical difficulties exist in maintaining an action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in a creditor following the property of the corporation into the hands of any one not a *bona fide* creditor or purchaser, and asserting his lien thereon, and obtaining satisfaction of his just debt out of that fund specifically set apart for its payment when the debt was contracted, and charged with a trust for all the creditors when in the hands of the corporation, which trust the repeal of the charter does not destroy."¹

¹ *Curran v. State of Arkansas*, 15 Port Gibson, 6 Sm. & M. 513; *Commercial Bank of Natchez v. Chambers*, 8 Sm. & M. 61; *Hightower v. Mustian*, 8 Ga. 506; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *Horner v. Carter*, 3 McCrary, 595; *Hastings v. Drew*, 50 How. Pr. 254; *People v. National Trust Co.*, 82 N. Y. 283; *Hightower v. Thornton*, 8 Ga. 486; *Nevitt v. Bank of*

§ 1036. **Winding up Dissolved Companies.** — In order to obviate the inconvenient consequences ensuing from the dissolution of a corporation at common law, statutes have been passed in many of the States providing for the winding up of dissolved companies, and the distribution of their assets according to the equitable rights of those interested. Thus, in some States it is enacted that, after the dissolution of a corporation for any cause, the company shall continue to be a body corporate during a term of years, for the purpose of prosecuting and defending suits and settling up its affairs, but not for the purpose of carrying on its regular business.¹ In other States, trustees or receivers are appointed, whose duty it is to collect the assets of the company and liquidate its debts.²

§ 1037. Statutes of this description do not impair existing rights, nor do they confer a new right where there was none

83 Ohio St. 107; *Lewis v. Robertson*, 13 Sm. & M. 558; *Dudley v. Price*, 10 B. Monr. 84; *Rowland v. Meader Furniture Co.*, 38 Ohio St. 270.

Upon the death of an individual, a court of chancery will protect the claims of creditors upon the assets of the deceased. See *Offutt v. King*, 1 McArthur, 312.

Upon the dissolution of a corporation it may be allowed to wind up its affairs by its own liquidators. *State v. Herdic Coach Co.*, 35 La. Ann. 245.

¹ *Folger v. Chase*, 18 Pick. 66; *Crease v. Babcock*, 10 Metc. (Mass.) 567, 569; *In re Independent Ins. Co.*, 1 Holmes, 108; *Herron v. Vance*, 17 Ind. 595; *Mariners' Bank v. Sewall*, 50 Me. 220; *Blake v. Portsmouth, &c. R. R. Co.*, 39 N. H. 435; *Tuskaloosa Scientific, &c. Ass. v. Green*, 48 Ala. 346; *Bewick v. Alpena Harbor Imp. Co.*, 39 Mich. 700; *Muscatine Turnverein v. Funck*, 18 Iowa, 471; *Ramsey v. Peoria, &c. Ins. Co.*, 55 Ill. 311.

If the charter of a corporation, or a general law, provides that after a certain day all banking powers of the company shall cease, "except those incidental and necessary to close up its business," pending suits will not abate. *Pomeroy v. State Bank*, 1 Wall. 23.

² See *Lothrop v. Stedman*, 13 Blatchf. 143; *Owen v. Smith*, 81 Barb. 641.

On dissolution of a corporation and the appointment of a receiver pursuant to statute, the title to its property goes to the receiver for equitable distribution. *Sword v. Wickersham*, 29 Kans. 746.

Under a statute providing that creditors should be entitled to have a receiver appointed at any time within three years after the dissolution of a corporation, it was held that the remedy was exclusive of every other remedy, and that a creditor would have no remedy whatever after the three years had expired. *Von Glahn v. De Rosset*, 81 N. Car. 467.

before; they merely provide a new remedy for enforcing existing rights in a more efficacious manner than was possible under the ordinary rules of chancery procedure. Hence, a law providing that a corporation shall continue in existence after the expiration of its charter merely for the purpose of winding up its affairs, is not unconstitutional. Such a law would neither impair any rights of the company's shareholders, nor impose any new obligations upon its debtors.¹

§ 1038. *Reorganization or Revivor.*—After a corporation has been dissolved, or has lost its franchise or right to continue its operations, it may be reorganized or revived pursuant to authority newly conferred by the State. It is clear, however, that this can be done only with the consent of the incorporators; for although the legislature may at any time confer franchises or privileges, it cannot arbitrarily compel any one to accept them or use them.² Hence, if a corporation is dissolved by expiration of its charter according to the limitations contained in it, (the agreement of the incorporators having thereby come to an end,) the legislature will have no power to revive its existence.³ If, however, the dissolution of a corporation takes place merely by reason of an extinguishment of its franchises, before the charter agreement itself has expired, there seems to be no reason why the legislature may not continue the corporate existence by a

¹ *Nevitt v. Bank of Port Gibson*, 6 Sm. & M. 513, 521-531, 557-575; *Commercial Bank of Natchez v. Chambers*, 8 Sm. & M. 49; *Lewis v. Robertson*, 13 Sm. & M. 558; *Miami Exporting Co. v. Gano*, 13 Ohio, 270; *Atlas Bank v. Nahant Bank*, 23 Pick. 487; *Ingraham v. Terry*, 11 Humph. 572; *Western N. C. R. R. Co. v. Rollins*, 82 N. Car. 523. And see *McLaren v. Pennington*, 1 Paige, 111; *Robinson v. Lane*, 19 Ga. 388. But compare *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8; *Paschall v. Whitsett*, 11 Ala. 472. See also *infra*, § 1076.

² *Supra*, § 24. If the purchasers of the property of a corporation under a foreclosure sale of the property of the company organize as a new corporation, it is plain that the shareholders of the old company have no rights against the new company, except such as are created by contract with the purchasers. *Thornton v. Wabaah Ry. Co.*, 81 N. Y. 462.

³ See *supra*, § 24; *People v. Manhattan Co.*, 9 Wend. 381-383. Compare *Bellows v. Hallowell, &c. Bank*, 2 Mason, 31, 46.

grant of new franchises. The charter contract would not be infringed or altered thereby; but the corporators would merely be enabled by law to carry out their original agreement.¹

It was formerly held, that, if a corporation becomes dissolved by the loss of an integral part, this may be restored, and the corporation be revived by an act of the legislature or of the King alone;² and under these circumstances the act of revivor should be considered, not as a grant of new franchises, but rather as a waiver of an irregularity in the appointment of the missing member.³

§ 1039. *Jurisdiction in Equity over Corporations.* — The general principles upon which the jurisdiction of the courts of chancery in suits brought by or against corporations rests, may conveniently be referred to in this connection. It will be found that these principles are the same general principles of equity jurisprudence that are applicable to all persons alike. The courts of chancery have no special jurisdiction over corporations.

§ 1040. *A Court of Equity cannot decree a Forfeiture of Franchises.* — It is well settled that the courts of equity have no jurisdiction, unless it be conferred by statute, to decree the dissolution of a corporation *by forfeiture of its franchises*, either at the suit of an individual,⁴ or at the suit of the State.⁵ The State alone can insist on a forfeiture of franchises, and the State has an adequate remedy at law,

¹ *Supra*, §§ 399, 1083.

² *Rex v. Pasmore*, 3 T. R. 199, *per* Lord Kenyon; *Mayor of Colchester v. Seaber*, 3 Burr. 1866; 1 W. Bl. 591.

³ *Mayor of Colchester v. Brooke*, 7 Q. B. 839, 881; *Mayor of Colchester v. Seaber*, *supra*.

With regard to the rights of creditors upon the revivor of a corporation, see *supra*, § 811.

⁴ *Folger v. Columbian Insurance Co.*, 99 Mass. 274; *Slee v. Bloom*, 5 Johns. Ch. 377; *Doyle v. Peerless Petroleum Co.*, 44 Barb. 239; *Ver-*

planck v. Mercantile Ins. Co., 1 Edw. Ch. 88; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Society for Establishing Manufactures v. Morris Canal, &c. Co.*, 1 N. J. Eq. 157; *Doremus v. Dutch Reformed Church*, 3 N. J. Eq. 349. Compare *supra*, §§ 282-284.

⁵ *State v. Merchants' Ins., &c. Co.*, 8 Humph. 252; *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 389; *Atty.-Gen. v. Bank of Niagara*, *Hopk.* 354; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 88.

by *quo warranto*, to obtain a judgment of forfeiture and dissolution.

§ 1041. **A Court of Equity cannot interfere merely to prevent a Breach of the Law.**—The fact that a corporation is about to exceed its chartered powers, or to commit any other unlawful act, is not alone a sufficient ground for the interference of chancery at the suit of a person who is not a member of the company. This rule rests upon the obvious principle, that no person can complain of a wrong without showing some special injury to himself. If a corporation exceeds its franchises, or commits any other breach of the law, this is an injury to the public generally; and it is well settled that, for an injury to the public generally, the individuals composing the public cannot sue separately, but the State must sue on behalf of all.¹

A court of chancery has no jurisdiction to issue an injunction, at the suit of the prosecuting officer of the State, to restrain a corporation from exceeding its chartered powers, or from doing acts otherwise illegal, unless it be shown that such acts are injurious to the public, and that the remedy by injunction is required upon equitable grounds. There is no reason why chancery should enjoin a corporation from committing a breach of the law in any case in which similar relief would not be granted against an individual. A court of

¹ *Ware v. Regent's Canal Co.*, 3 De G. & J. 228; *Mayor, &c. of Liverpool v. Chorley Water-Works Co.*, 2 De G., M. & G. 852; *Stockport, &c. Water-Works Co. v. Mayor, &c. of Manchester*, 9 Jur. n. s. 266; *Pudsey Coal-Gas Co. v. Bradford, L. R.* 15 Eq. 167; *Thorne v. Taw Vale Ry., &c. Co.*, 13 Beav. 10; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *O'Brien v. Norwich, &c. R. R. Co.*, 17 Conn. 872; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91; *Dover v. Portsmouth Bridge Co.*, 17 N. H. 200; *Osborne v. Brooklyn City R. R. Co.*, 5 Blatchf. 366; *Sixth Ave. R. R. Co. v. Gilbert Elevated R. R. Co.*, 41 N. Y. Super. Ct. 489; *Buck Mountain Coal Co. v. Lehigh Coal, &c. Co.*, 50 Pa. St. 91; *Spooner v. McConnell*, 1 McLean, 837; *Wesson v. Washburn Iron Co.*, 18 Allen, 100; *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401. Nor will an action lie at law. *Sargent v. Boston, &c. R. R. Co.*, 115 Mass. 416.

Compare *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138, which was a suit to enjoin a corporation from interfering with plaintiff's monopoly, and to adjudge its charter void as a cloud upon plaintiff's rights.

equity has clearly no general jurisdiction to act as conservator of the laws, or to enjoin the commission of crimes and misdemeanors, at the suit of the Attorney-General. It is difficult to perceive, then, why equity should interfere to prevent a bare usurpation of corporate authority, or any other mere breach of the law, from being committed by an incorporated company.

In *Attorney-General v. Utica Insurance Company*, Chancellor Kent refused to issue an injunction, on motion of the Attorney-General, to restrain an insurance company from engaging in banking operations in violation of its charter and the general laws of the State. The learned judge said: "If a charge be of a criminal nature, or an offence against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right, resting in equity or where the remedy at law was not sufficiently adequate. . . . If the defendants are carrying on banking operations contrary to law, they ought, undoubtedly, to be restrained; but I cannot be of opinion that the operation is such a mischief or public nuisance as to require the immediate and extraordinary process of this court to abate it. . . . When the question is, whether a corporation has forfeited its charter, or usurped a franchise, or has broken a penal law, . . . this court is not the proper tribunal to sustain the prosecution or inflict the punishment."¹

¹ *Atty.-Gen. v. Utica Ins. Co.*, 2 Ch. D. 449, 501-508, *per* Bramwell, Johns. Ch. 371, 378, 380, 389. See also *Atty.-Gen. v. Bank of Niagara*, Hopk. 354, 360; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 88; *People v. Miner*, 2 Lans. 396; *People v. Albany, &c. R. R. Co.*, 24 N. Y. 261; *Atty.-Gen. v. Bank of Michigan, Haring*, Ch. 321; *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 244. Ch. D. 449, 501-508, *per* Bramwell, L. J. An appeal was taken, but the point was not passed upon. L. R. 5 App. Cas. 473. Compare *Atty.-Gen. v. Great Northern Ry. Co.*, 1 Dr. & Sm. 154; *Ware v. Regent's Canal Co.*, 3 De G. & J. 228; *Atty.-Gen. v. Mid-Kent Ry. Co.*, L. R. 3 Ch. 100.

The decision of Chancellor Kent in *Atty.-Gen. v. Utica Ins. Co.*, *supra*, has been assailed in an elaborate opinion delivered by Ryan, C. J., in *Atty.-Gen. v. The Rail-*

§ 1042. But a Court of Equity may always interfere upon Equitable Grounds. — It is well settled that a court of chancery has jurisdiction to grant equitable relief against a corporation at the suit of an individual, whenever a sufficient case for relief is shown, upon the ordinary principles of equity jurisprudence; and the fact that the act of the corporation against which relief is sought involves an unauthorized exercise of corporate power, or other breach of the law, is wholly immaterial under these circumstances.

Thus, a shareholder may obtain an injunction, and other equitable relief, to protect his rights in the corporation from being impaired, by a misapplication of the corporate funds, or other violation of the company's charter. And there can be no doubt that equity has jurisdiction in any other case to grant relief against a corporation, upon the same terms as against an individual under similar circumstances.¹

§ 1043. When a Court of Equity will grant Relief at the Suit of the Government. — It is well settled that "a court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the Attorney-General in England, and at the suit of the State, or the people, or municipality, or some proper officer representing the commonwealth, in this country."² So it was held from the earliest times that the Attorney-General could sue in equity on behalf of the public for the protection of charitable trusts and other trusts in which the public generally were interested.³

road Companies, 35 Wis. 482, 523-550. A full collection of the authorities bearing upon the general question may be found here. Compare also *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 679.

¹ *Atty.-Gen. v. Railroad Companies*, 35 Wis. 582, 583, and cases cited; *Delaware, &c. Canal Co. v. Camden, &c. R. R. Co.*, 16 N. J. Eq. 321; *Raritan, &c. R. R. Co. v. Delaware, &c. Canal Co.*, 18 N. J. Eq. 546; *Bonaparte v. Camden, &c. R. R. Co.*, Baldwin, 227; *Moorhead v. Lit-*

tle Miami R. R. Co., 17 Ohio, 340; *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. 71; *Hudson, &c. Canal Co. v. New York, &c. R. R. Co.*, 9 Paige, 323; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Buller v. Society, &c.*, 12 N. J. Eq. 264; *Society, &c. v. Butler*, 12 N. J. Eq. 498; *Ross v. Elizabethtown, &c. R. R. Co.*, 2 N. J. Eq. 422.

² *Pomeroy's Eq. Jur.* § 1849; *Story's Eq. Jur.* §§ 921-923.

³ *Story's Eq. Jur.* § 1186; *Parker v. May*, 5 Cush. 388-340; *Jackson*

So it has been held that the government may, through its prosecuting officer, sue in equity to restrain a public corporation and its officers from usurping powers which were not granted to them, and from any acts which would cause an irreparable wrong to the community.¹

The same general principles apply where equitable relief is sought by the government against a corporation for wrongful acts committed by the corporation to the injury of the public. Under these circumstances, the courts of equity are not deprived of jurisdiction by the fact that the commission of the wrong incidentally involved an unauthorized exercise of corporate power, or other breach of the law.

The right of the government to sue in equity is especially clear where companies, which have received public property or public powers upon a trust in favor of the public, threaten to violate the trust so assumed. Thus, when the power of eminent domain is granted to a corporation, such as a railroad company, it is given upon the trust, that it shall be used by the corporation so as to give the public the benefit of a railroad upon the payment of reasonable charges.² Any attempt on the part of the corporation to deprive the public of these benefits, or to defeat the just expectations of the State, would therefore constitute a breach of duties assumed by the corporation in favor of the public; and if a continuous violation of the rights of the public is threatened, a court of equity may grant an injunction at the suit of the proper government officer.

This doctrine has often been affirmed by the courts. Thus, it has repeatedly been decided that a suit may be maintained

v. Phillips, 14 Allen, 589; *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 244; *Atty.-Gen. v. Leicester*, 7 Beav. 176.

¹ *Atty.-Gen. v. West Hartlepool*, &c. Comm'rs, L. R. 10 Eq. 152; *Ewing v. Board of Education*, 72 Mo. 440; *People v. Mayor, &c. of New York*, 82 Barb. 35, affirmed 82 Barb. 102; *State v. Mayor, &c. of New York*, 8 Duer, 159.

A suit in equity may be brought by the government to restrain the governing officers of a municipality from issuing negotiable bonds in violation of the law, if there is danger that the bonds would become a charge upon the municipality in the hands of innocent purchasers. *State v. Saline County Court*, 51 Mo. 350.

² *Infra*, Chapter XVI.

in equity on behalf of the public to restrain a corporation from doing any unauthorized act amounting to a public nuisance.¹ So, if a company which has assumed obligations to the public threatens to violate these obligations and thereby cause an irreparable injury to the public, a court of equity will grant an injunction. In *Attorney-General v. Railroad Companies*,² injunctions were granted at the suit of the Attorney-General, acting for the State, to restrain several railroad companies from exacting tolls for the carriage of passengers or freight in excess of the maximum rates allowed by law.

¹ *Atty.-Gen. v. Jamaica Pond Aqueduct Co.*, 133 Mass. 361, 368; *District Attorney v. Lynn, &c. R. R. Co.*, 16 Gray, 242; *Atty.-Gen. v. Boston Wharf Co.*, 12 Gray, 553; *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 244; *Atty.-Gen. v. The Cohoes Co.*, 6 Paige, 133; *Atty.-Gen. v. Hudson River R. R. Co.*, 1 Stockt. 526; *Commonwealth v. Pittsburgh, &c. R. R. Co.*, 24 Pa. St. 159; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 98; *State v. Wheeling, &c. Bridge Co.*, 13 How. 518, 566; *Atty.-Gen. v. Toronto Street Ry. Co.*, 14 Grant (U. C.), Ch. 673; *State v. Dayton, &c. R. R. Co.*, 36 Ohio St. 434; *Atty.-Gen. v. Cocker-*

mouth Local Board, L. R. 18 Eq. 172; *Atty.-Gen. v. Leeds Corp.*, L. R. 5 Ch. App. 538; *Atty.-Gen. v. Mayor of Southampton*, 1 Giff. 363; *Ware v. Regent's Canal Co.*, 3 De G. & J. 212, 228.

² *Atty.-Gen. v. Railroad Companies*, 35 Wis. 432, 523 *et seq.*, and cases cited. See also *Commonwealth v. Pittsburgh, &c. R. R. Co.*, 24 Pa. St. 159; *Atty.-Gen. v. Great Northern Ry. Co.*, 1 Dr. & Sm. 154, 161, 162; *Atty.-Gen. v. Great Eastern Ry. Co.*, L. R. 11 Ch. Div. 449; *Atty.-Gen. v. Mid-Kent Ry. Co.*, L. R. 3 Ch. App. 103, 104.

CHAPTER XV.

LEGISLATIVE CONTROL OVER PRIVATE CORPORATIONS.

PART I.

THE CONSTITUTIONALITY OF LEGISLATION AFFECTING
PRIVATE CORPORATIONS.

§ 1044. **Constitutional Prohibitions.**—Section 10 of Article I. of the Constitution of the United States provides that “no State shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.”¹

The Fourteenth Amendment of the Constitution provides that no State shall “deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”²

The Fifth Amendment, limiting the powers of the Federal government, provides that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”³

Similar provisions in the constitutions adopted by the several States limit the powers of the State legislatures.

All of these provisions were designed to enforce a general principle of right, which lies at the foundation of all political

¹ A State constitution adopted by vote of the people is a “law” within this prohibition. *Railroad Co. v. McClure*, 10 Wall. 511; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.

² This amendment was adopted in 1868.

³ *Withers v. Buckley*, 20 How. 84. As to what constitutes a taking of property within the meaning of the Constitution, see *Pumpelly v. Green Bay Co.*, 18 Wall. 166; *Story v. New York, &c. R. R. Co.*, 90 N. Y. 122, 168.

liberty, as has often been declared by the framers of our system of government. The principle is that all men have a natural and inherent right to "life, liberty, and property,"¹ or "life, liberty, and the pursuit of happiness";² that governments are instituted to secure this right, deriving their just powers from the consent of the governed; and that any interference by a government with this inherent right of the individual members of the community can be justified only as a means of securing the most effectual enjoyment of the right to all.

How far these constitutional provisions restrict the powers of the government to enact laws affecting private corporations will be the subject of inquiry in this chapter.³

§ 1045. *A Charter said to be a Contract.* — *The Dartmouth College Case.* — It has often been said, both by judges and by legal text-writers, that the charter of a corporation is a contract within the meaning of the constitutional prohibition against State laws impairing the obligation of contracts.⁴ This doctrine first received judicial sanction in the decision of the famous Dartmouth College Case by the Supreme Court of the United States. The facts of the case were substantially as follows. In the year 1769 the King of England granted a charter constituting twelve persons therein named a corporation under the name of "The Trustees of Dartmouth College," with power to fill vacancies in their body. The purposes of the corporation were to establish a

¹ The first resolution of the Declaration of Rights of 1774 is, that the inhabitants of the Colonies "are entitled to life, liberty, and property; and that they have never ceded to any sovereign power whatever a right to dispose of either without their consent."

² Declaration of Independence.

³ In England and in the Dominion of Canada there is no constitutional limitation preventing the enactment of laws impairing the obligation of contracts. Canada

Southern Ry. Co. v. Gebhard, 109 U. S. 527; *Canada Car. &c. Co. v. Harris*, 24 U. C. C. P. 380.

⁴ In *Wilmington R. R. Co. v. Reid*, 13 Wall. 266, Justice Davis said: "It has been so often decided by this court, that a charter of incorporation granted by a State creates a contract between the State and the corporators, which the State cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded."

college for the education and instruction of the youth of the Province in the arts and sciences, and for the dissemination of civilization and Christianity among the Indian tribes. The charter further authorized the corporation to receive, hold, and administer property, to enable it to accomplish these purposes.

After the corporation thus constituted had existed for nearly fifty years, and had received donations and endowments, the legislature of New Hampshire enacted several laws, altering its management and purposes in important particulars. By these acts the name of the corporation was changed to "Trustees of Dartmouth University"; the board of trustees constituting the corporate body was increased by the addition of nine trustees, to be appointed by the Governor and Council, and provision was made for the appointment by the Governor and Council of a board of twenty-five overseers. The entire management of the institution was placed in the hands of the increased board of trustees, subject to the control of the overseers, and authority was conferred to establish new colleges and an Institute, and to use the property and funds of the corporation for these purposes.

The trustees in office at the time when the legislature enacted these laws refused to be bound by them, on the ground that they were in violation of the prohibition of the Constitution against laws impairing the obligation of contracts; and this view was sustained by the Supreme Court of the United States. Chief Justice Marshall and Justice Story delivered elaborate opinions, holding that the charter of the corporation contained a contract, but neither of these learned judges pointed out the exact terms of this contract. It was apparently assumed by them that the grant of the charter created a contract between the Crown and the grantees, and that the obligation of this contract devolved upon the State of New Hampshire and the successors of the original trustees respectively. Both of the learned judges, however, laid special stress upon the fact, that donations had been made to the corporation for the purposes and upon the trusts indicated by the charter.

Chief Justice Marshall said: "An artificial immortal being was created by the Crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives; they are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. . . . This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation."¹

Justice Story said: "The corporation was expressly created for the purpose of distributing in perpetuity the charitable donations of private benefactors. By the terms of the charter the trustees and their successors, in their corporate capacity, were to receive, hold, and exclusively manage all the funds so contributed. The Crown, then, on the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes,

¹ Dartmouth College v. Woodward, 4 Wheat. 642, 648.

without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. From the very nature of the case, therefore, there was an implied contract on the part of the Crown with every benefactor, that, if he should give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the Crown would not revoke or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor upon a like consideration, that it would administer his bounty according to the terms and for the objects stipulated in the charter."¹

It is difficult to support the theory, that the grant of a charter involves the creation of a contract between the State and the grantees that the charter shall be inviolable; but it is undoubtedly true, that contracts created on the faith of a charter cannot be impaired under the guise of altering the charter. If, then, the trust created by a gift to a charitable corporation is a contract within the meaning of the constitutional prohibition, it follows that the legislature of a State cannot alter the use and disposition of the funds so granted by altering the purposes of the corporation. This would impair the contract between the donors and the beneficiaries of the trust, of which the corporation is the legal guardian, irrespective of any supposed contract between the corporation and the State. Such legislation would be equally unconstitutional, if applicable to a charitable trust assumed by an unincorporated society or a single individual.²

§ 1046. *In what respect a Charter embodies a Contract.* — The statement that a charter of incorporation is a contract conveys no definite idea to the mind, unless the parties to the supposed contract and the terms of their agreement are

¹ 4 Wheat. 680.

² See *infra*, § 1049.

understood. It is therefore necessary to consider what are the functions of a charter.

It has been pointed out in the first chapter of this treatise that the term "corporation" has been applied to various essentially different kinds of institutions. Charters of incorporation vary equally in their nature and functions.

The charter of a private business corporation or incorporated company operates primarily as a law repealing the common law prohibition against the formation of corporate associations, and enabling the members of the company legally to accomplish the purposes for which they have associated. In this respect, a special charter or general incorporation law operates in the same manner as a law authorizing the formation of limited partnerships or joint-stock companies. Sometimes the charter or law also confers upon the corporation special legal powers, such as the power of taking property upon making compensation, or an exemption from laws applicable to other persons. After the corporation has been formed pursuant to such a charter or incorporation law, it fulfils a second equally important function. It contains, in whole or in part, the terms of the contract, or articles of agreement, by which the shareholders or members of the corporation are bound together, and indicates the purposes for which they have contributed or agreed to contribute the company's capital.¹

The charter of a charitable corporation, like that of a business corporation, operates primarily as a law enabling the members of the corporation to accomplish legally the purposes for which they have united. But it does not embody a contract among the corporators, like the charter of a business corporation. It rather embodies a declaration of trust, — namely, the trust assumed by the corporation in respect of the funds contributed to it.²

¹ *Supra*, Chapter VI. The entire constitution of a corporation, including the charter, general laws, and articles of association entering into the formation of the company, must, of course, be taken together in order to ascertain the contract of association.

² *Supra*, § 4.

The functions of the so-called "charter" of a public or municipal corporation are entirely different. The charter of such a corporation is not an enabling act, nor does it embody a contract or declaration of trust. Such a charter is not offered to the corporators for their acceptance, but is merely a law enacted by the State, in the exercise of its legislative powers, for the convenient government of a community.¹

§ 1047. *The Contract among the Shareholders cannot be impaired. — The Purposes of a Corporation cannot be altered. —* Whatever doubt there may be as to the correctness of the doctrine that a charter of incorporation embodies a contract between the State and the corporators, there can be no doubt that the charter of an ordinary business corporation embodies a contract among the corporators themselves. The shareholders of such a corporation mutually agree to unite for the purposes indicated in their charter. Each shareholder agrees to contribute his proportionate share of the capital of the association, and each, in return, becomes entitled to a share in the profits and in the management of the corporate affairs. The agreement thus created is, in the strictest sense of the word, a contract; and every reason exists for treating it as a contract within the meaning of the provision of the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts.

A State is, therefore, prohibited by the Constitution from passing a law *altering* the purposes of a corporation, as set out in its charter, because such a law would impair the contract existing among the members of the association.² Moreover, such a law would be unconstitutional, because it would, without "due process of law," and without "just compensation," take away from the corporators funds invested by them upon certain specified trusts, and would apply these funds to uses to which their owners never consented.³

¹ *Supra*, §§ 3, 24.

² *Infra*, § 1059 *et seq.* Such a law would violate the rights of each individual shareholder; and the ma-

jority could not by their assent dispose of the rights of a minority. See *supra*, § 645.

³ *Sinking Fund Cases*, 99 U. S.

Accordingly, it was held by the Supreme Court of Pennsylvania that a shareholder in a corporation could not be compelled, by an act of the legislature, to become a shareholder in a new corporation formed by consolidation. Chief Justice Lowrie, delivering the opinion of the court, said: "He may object, that it is a violation of the contract by which he and his associates agreed to become one corporate company for a given purpose; that he united in the association for one purpose, then agreed on, and now the majority are diverting their capital to a different purpose. This is a violation of chartered contracts; not the supposed contract between the government and the corporators, *but the one between the corporators themselves.*"¹

§ 1048. **Whether a Law dissolving a Corporation would impair a Contract among its Shareholders.** — It would seem that a law dissolving a corporation, or rendering the further transaction of its business and the performance of the agreement of association illegal, would likewise be unconstitutional irrespective of any contract between the State and the corporators. A State cannot, by enacting a law, render illegal and prohibit the performance of a contract which was legal when entered into by the parties, unless this be done by an exercise of the police power which was not restricted by the constitutional prohibition. It is immaterial that the right to enter into the contract was originally given by statute. Thus, after a married woman has entered into a valid contract, pursuant to an existing statute, the State could not by any subsequent legislation impair this contract, or discharge its obligation.

So the contract of association by which a private business corporation is formed by its members, is rendered legal by a charter or general law passed by the legislature. After such

737, 738, 746, 761, 766. Compare *kie v. Hackensack, &c. R. R. Co.*, 18 Nevitt v. Bank of Port Gibson, 6 N. J. Eq. 178; New Orleans, &c. Sm. & M. 563. R. R. Co. v. Harris, 27 Miss. 517,

¹ *Lauman v. Lebanon Valley* 536; *Clearwater v. Meredith*, 1 Wall. R. R. Co., 30 Pa. St. 46. See also 39; *Stone v. Mississippi*, 101 U. S. Black v. Delaware, &c. Canal Co., 814, 817, per Chief Justice Waite. 24 N. J. Eq. 455, 463; *Zabris-*

a contract has once been legally entered into, it would seem that the State could not, unless by exercise of its police power, prevent its performance for the period agreed between the parties, without impairing the obligation of the contract. An analogous case would be presented by a partnership or joint-stock company formed for similar purposes, and to carry on business for a like period of time, as the corporation. Could the State by law dissolve the partnership or joint-stock company, and render the transaction of its business illegal, or would such a law impair the contract between the partners or members of the company, within the meaning of the constitutional prohibition?

§ 1049. *Charitable Trusts cannot be impaired.* — The constitutionality of a law altering the charter of a charitable corporation depends upon the substantial effect which the alteration would have upon the use or control of the funds held by the corporation. The members of a purely charitable corporation are not united by a contract or agreement, like the members of a business company; their functions are rather those of trustees, whose duty is to administer the funds of the corporation for the uses indicated by the charter. A law altering the charter of such a corporation would therefore not be unconstitutional, because impairing a contract among the members of the corporation. However, if the effect of such an alteration would be to apply the funds of the corporation to other uses than those for which the funds were contributed, it would be unconstitutional, because involving a taking of private property without due process of law, in violation of the Fourteenth Amendment. It would impair the constitutional rights of the existing beneficiaries of the trusts upon which the funds were granted, and of the reversioners in case of a failure of the objects of the grant.

Moreover, such a law would impair the obligation of contracts, within the meaning of the Constitution. The term "contract" is used in the Constitution in its broadest sense. It applies to all contractual obligations, whether they be called contracts in technical phraseology or not. Grants as well as

unexecuted agreements,¹ trusts as well as common law agreements, are equally within the protection of the prohibition. Donations to a charitable corporation are impliedly made in trust for the purposes indicated by its charter, and the performance of this trust is assumed by the corporation; the obligations thus created are deemed contracts within the meaning of the Constitution, and cannot be impaired by a law altering the purposes of the institution.²

§ 1050. *The Contract between the State and the Corporators.*—It has often been said, that the grant of franchises contained in a charter of incorporation constitutes a contract between the State and the grantees, and therefore cannot be impaired by subsequent legislation. This statement, however, is not quite accurate.

A franchise is merely a legal right or privilege,³ and may result from a simple legislative enactment without any contract between the State and the possessors of the privilege. There is a plain distinction between a simple legislative enactment, that a person or association shall be authorized to exercise certain rights or powers, and a contract or treaty made by the State, through its legislature, that the person or association shall be entitled to exercise the rights or powers. If a franchise is the result of a mere legislative enactment, it may undoubtedly be cut short by repeal of the enactment. If, however, the franchise is conferred by a contract or treaty on the part of the State, and is absolute in terms, it must be regarded as an irrevocable right. A reservation in a grant or contract, that the grantor or contracting party may annul or alter his own grant or contract, can never be implied; the performance of a contract is never *impliedly* optional.⁴ Hence, if a franchise is conferred by a contract or grant on the part of the State, the State cannot revoke or alter it in its capacity of grantor, unless the right to revoke or alter it was expressly

¹ *Fletcher v. Peck*, 6 Cranch, 87, 136; *Farrington v. Tennessee*, 95 U. S. 688.

³ *Dartmouth College v. Woodward*, 4 Wheat. 518.

² *Supra*, § 922 *et seq.*

⁴ See *per* Justice Bradley, in *Sinking Fund Cases*, 99 U. S. 749.

reserved. Nor can the State revoke or alter it in the exercise of the sovereign power of legislation, for that is prohibited by the Constitution of the United States.

§ 1051. **Power of the Legislature to bind the State by Contract.** — The doctrine that a grant of franchises by act of the legislature, when accepted by the grantees, becomes a contract within the protection of the Constitution of the United States, implies that the legislature making the grant had not only the intention, but also *the power*, to make a contract or treaty on behalf of the State that the franchise shall be irrevocable.

It should be borne in mind that the legislature of a State is not the State itself, and that it can grant franchises in the name of the State solely by virtue of the powers delegated to it. Hence, if a grant of franchises is a contract which cannot be impaired by subsequent legislation, the legislature of a State must have a delegated authority to make a contract or treaty on behalf of the State that the franchises shall belong to the grantees as irrevocable rights. The principles of constitutional law underlying this question cannot be discussed in this treatise. It is sufficient to say that it is settled by the highest authority that such power does exist *to a limited extent*, unless it is expressly taken away by the State constitutions.

§ 1052. However, it is equally well settled that there are certain powers belonging to the States which no legislature can limit, even in a particular case, by a contract or irrevocable grant of franchises. These powers are generally called the police powers, and their undiminished existence is essential to the welfare of the community. It must, therefore, be considered in excess of the powers delegated by the people to their legislatures, to abridge these powers by any contract or grant of franchises.

*Stone v. Mississippi*¹ is an important authority upon this point. The legislature of the State of Mississippi had chartered a corporation, with the privilege of holding lotteries for a period of twenty-five years, in consideration of certain pay-

¹ *Stone v. Mississippi*, 101 U. S. 614.

ments to be made to the State. Before this charter had expired, the State adopted a constitution, declaring that no lottery theretofore authorized be permitted to be drawn, or tickets therein to be sold. It was claimed that this provision was in violation of the Constitution of the United States, because impairing the franchises previously granted to the company for a valuable consideration. But the Supreme Court of the United States decided that it was a legitimate exercise of the police power of the government, and therefore not unconstitutional. Chief Justice Waite, delivering the opinion of the court, said : —

“ If the legislature that granted this charter had the power to bind the people of the State, and all succeeding legislatures, to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way.

“ All agree that the legislature cannot bargain away the police power of the State. ‘ Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State ; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.’¹ Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself, which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. Neither can it be denied that lotteries are proper subjects for the exercise of this power. . . .

¹ Metropolitan Board of Ex- Boyd v. Alabama, 94 U. S. cise v. Barrie, 84 N. Y. 657; 645.

"The question is directly presented whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. . . . The power of governing is a trust committed by the people to the government, no part of which can be granted away. . . .

"The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. . . . Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter, does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not."¹

§ 1053. **When Franchises are Contract Rights. — The Necessity of a Consideration. —** In analogy to the common law rule

¹ 101 U. S. 817-821. See also *Ill. 277; Lake View v. Rose Hill Beer Co. v. Massachusetts*, 97 U. S. Cemetery Co., 70 Ill. 191; *State v. 83; Boyd v. Alabama*, 94 U. S. 645; *Woodward*, 89 Ind. 110. Compare *Regents of University v. Williams*, *New Orleans Gas Co. v. Louisiana 9 G. & J. 865; State v. Morris*, 77 Light Co., 115 U. S. 650. *N. Car. 512; Dingman v. People*, 51

that a promise without a consideration is not binding, it has been held that a grant by a State of an exemption from taxation, which is in effect a promise not to tax, does not bind the State as a contract or treaty, unless the grant be made for a consideration.¹ The same rule would undoubtedly be applied to any other grant by a State of a continuing privilege or future right. It should be observed, however, that the rule, when applied to grants by the legislature, is merely a rule of construction for ascertaining the legislative will, and not a rule of positive law. The legislature of a State may repeal the common law rule that a contract requires a consideration, if that rule were applicable to contracts made by the State; and if the legislature in making a grant of a franchise intends that it shall bind the State as a contract or treaty, it will be binding, and within the protection of the Constitution, whether it was made for a consideration or not.²

Accordingly, it has been held that, if the legislature grants an exemption from taxation, or other privilege to be enjoyed in the future, by a charter of incorporation, upon the faith of which a corporation is formed, it will be held that the legislature intended the grant to be binding upon the State as a contract or treaty. The same rule will be applied if the future privilege is conferred by an act of the legislature, making an alteration of the company's charter, which must be consented to by the shareholders.³ But a simple grant of a future privilege to an existing corporation, without any consideration moving from the grantee, will not be held binding as a contract, unless the terms of the grant show beyond a doubt that it was intended to be irrevocable.⁴

¹ See cases in the following notes.

² *Dartmouth College v. Woodward*, 4 Wheat. 683, 684, *per* Justice Story.

³ *University v. People*, 99 U. S. 309; *Commonwealth v. Pottsville Water Co.*, 94 Pa. St. 516.

⁴ *Tucker v. Ferguson*, 22 Wall. 574; *West Wisconsin R. R. Co. v. Supervisors*, 98 U. S. 595; *Christ Church Hospital v. Philadelphia*

County, 24 How. 300; *Salt Co. v. East Saginaw*, 13 Wall. 373; *Hewitt v. New York, &c. R. R. Co.*, 12 Blatchf. 452; *People v. Commissioners of Taxes*, 47 N. Y. 501; *St. Louis, &c. Ry. Co. v. Loftin*, 30 Ark. 693. Compare *Derby Turnpike Co. v. Parks*, 10 Conn. 543. *St. John's College v. State*, 15 Md. 330; *Philadelphia, &c. Ry. Co.'s Appeal*, 102 Pa. St. 123.

However, although a grant of a continuing privilege, such as an exemption from taxation, be void as a contract for want of a consideration, it remains valid as a law enacted by the legislature, and must therefore be enforced until repealed. Any benefits received in pursuance of a promise made without a consideration constitute a gift, and cannot be subsequently revoked by the donor; moreover, it is plain that rights which have vested under an existing law are not affected by a repeal of the law and cannot be impaired by retrospective legislation.¹

§ 1054. *What Rights of a Corporation are secured by Contract with the State.* — It has often been held that the charter of a private corporation must be construed as embodying a contract on the part of the State that the corporation shall be allowed to carry out its purposes according to the charter. This may be true of special charters granted by the legislature, with the intention of binding the State and the grantees to mutual obligations. At the present day, however, corporations are usually formed under general laws, which extend the right of forming corporations to all persons. There is no more reason for holding that the formation of a corporation pursuant to such a general law gives rise to a contract with the State, than that the formation of a limited partnership, or joint-stock company, or the execution of any other executory contract authorized by a general law, involves the creation of a collateral contract with the State that the parties to the agreement shall be allowed to perform it.

It seems to be a matter of little practical importance whether the members of a corporation have a contract right as against the State to carry out the purposes of their association or not. After a corporation has been legally formed, the State would be unable to alter its purposes or dissolve it, because this would impair the obligation of the contract between the members of the association.²

¹ *Covington, &c. R. R. Co. v. Nesbit*, 10 How. 395. See *supra*, Kenton County Court, 12 B. Monr. § 1044.
² See *supra*, §§ 1047, 1048.

§ 1055. **Special Franchises secured by Contract. — Exemption from Taxation.** — Any right, privilege, or immunity conferred upon a body of corporators by the legislature of a State, in the exercise of its power to bind the State by a contract or treaty, and not merely in the exercise of its law-making power, is binding upon the State, and cannot be impaired by subsequent legislation. If the right, privilege, or immunity was conferred by the State in the charter under which the corporation was formed, or subsequently for a valid consideration, it will usually be held that it was intended by the legislature as an irrevocable grant. Thus, it has repeatedly been held that an exemption from taxation conferred upon a corporation by its charter is binding upon the State, and cannot be impaired by subsequent legislation.¹ So, if the liability to taxation is limited by the charter to a certain amount, it cannot be subsequently increased.²

However, the grant of an exemption from taxation, by act of the legislature, can never be implied; nor can such an exemption be construed as a contract not to tax, unless the intention of the legislature that the exemption shall be irrevocable be clear. The power of taxation is essential to the existence of a State, and the courts will not presume that the legislature of a State intended to barter away this power even in special instances.³

§ 1056. **Other Special Franchises.** — The doctrine that a right or privilege conferred by the legislature in a charter of

¹ *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Wilmington R. R. Co. v. Reid*, 13 Wall. 264; *McGee v. Mathis*, 4 Wall. 148; *Pacific R. R. Co. v. Maguire*, 20 Wall. 36; *North Missouri R. R. Co. v. Maguire*, 20 Wall. 46; *Humphrey v. Pegues*, 16 Wall. 244; *University v. People*, 99 U. S. 809; *Farrington v. Tennessee*, 95 U. S. 679; *Railway Company v. Philadelphia*, 101 U. S. 528; *Mobile, &c. R. R. Co. v. Kennerly*, 74 Ala. 566.

a State to barter away the right of taxation in any case has been strongly contested. See dissenting opinion of Justice Miller in *Washington University v. Rouse*, 8 Wall. 441, Chief Justice Chase and Justice Field concurring.

² *Dodge v. Woolsey*, 18 How. 331.

³ *Railroad Companies v. Gaines*, 97 U. S. 697; *Railroad Co. v. Commissioners*, 103 U. S. 1; *Railway Co. v. Philadelphia*, 101 U. S. 528; *Hoge v. Railroad Co.*, 99 U. S. 348; *Roosevelt Hospital v. Mayor of New York*, 84 N. Y. 108; *Dauphin, &c.*

The power of the legislature of

incorporation constitutes a contract between the State and the grantees, has been applied to a grant of the right of charging more than the usual rate of interest,¹ of condemning land by exercise of the power of eminent domain,² of fixing the tariff or tolls to be charged upon a public road,³ of forming a new corporation by consolidation with another company,⁴ and of an exemption of the servants of a company from the duty of serving upon juries or of working upon roads.⁵

§ 1057. **Grants of Exclusive Privileges and Monopolies.**—The legislature of a State may confer upon a corporation or individual citizen an exclusive right or monopoly, unless prohibited from doing so by the constitution of the State.⁶ The legislature may, moreover, bind the State by contract not to impair the exclusive right or monopoly by subsequent legislation. If an exclusive right or monopoly is granted to a corporation by the charter or law under which it is formed, and the corporation on its part assumes obligations in favor of the public, it will be held that the legislature intended the grant to be irrevocably secured by contract.

Thus, it has been held that the legislature of a State may bind the State by a contract irrevocably granting to a railroad company the exclusive right to construct and operate a railroad within certain lines and between given points, or to a bridge or ferry company the sole right of maintaining a bridge or ferry over a stream within designated limits, or to a water company or gas company the monopoly of supplying a city with water or gas, at reasonable rates.⁷

Ry. Co. v. Kennerly, 74 Ala. 588; 24; *Atty.-Gen. v. Railroad Companies*, 85 Wis. 588. See also *Chicago, &c. R. R. Co. v. Iowa*, 94 U. S. 161; and see *supra*, § 935.

¹ *Hazen v. Union Bank*, 1 Sneed, 115. *&c. R. R. Co. v. Ohio*, 95 U. S. 819.

² *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. 1, 108, 109. ⁴ *Zimmer v. State*, 80 Ark. 680.

³ *Hamilton v. Keith*, 5 Bush (Ky.), 458; *Philadelphia, &c. R. R. Co. v. Bowers*, 4 Houst. 506. Compare *supra*, §§ 941, 948.

⁵ *Zimmer v. State*, 80 Ark. 680. ⁶ *Gibbons v. Ogden*, 9 Wheat. 74; *Slaughter-House Cases*, 16 Wall. 65; and cases in following note.

⁷ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 665; *Sloan v. Pacific R. R. Co.*, 61 Mo.

But an intention to grant an exclusive privilege or monopoly ought not to be implied. Thus, if a company is incorporated for the purpose of building a highway or a toll bridge, but without an express agreement on the part of the State that no rival company shall be incorporated, the State may charter a company to build another highway or a free bridge, whose existence may cause serious injury to the business of the former company.¹

Nor can a grant of an exclusive privilege be extended beyond its obvious meaning. Thus, the exclusive right to build a bridge at a given point would not prevent the establishment of a ferry.² In a case decided by the Supreme Court of the United States, it was held that an exclusive right to build a bridge at a certain point was not infringed by the establishment of a bridge for the passage of railway trains alone.³

§ 1057 *a*. **Constitutional Limitations of the Power to grant Exclusive Privileges.** — The power of the legislature of a State to grant exclusive privileges or monopolies is sometimes restricted by constitutional limitations. Thus, the Bill of Rights of Kentucky provides, "that all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or

and cases cited; *Louisville Gas Co. v. Citizens' Gas Co.*, Id. 688; *New Orleans Water-Works Co. v. Rivers*, Id. 674; *Boston, &c. R. R. Co. v. Salem, &c. R. R. Co.*, 2 Gray, 1, 32-34; *Atlantic City Water-Works Co. v. Atlantic City*, 89 N. J. Eq. 367.

The grant of a monopoly to a water company to supply a city with water is impaired by a grant of authority to an individual to lay pipes for the purpose of supplying water for his own use. *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674.

¹ *Charles River Bridge v. Warren Bridge*, 11 Pet. 535, 549; *Turnpike Co. v. State*, 8 Wall. 210; *Bradley*

v. South Carolina Phosphate Co., 1 Hughes, 72; *Shorter v. Smith*, 9 Ga. 517; *Tuckahoe Canal Co. v. Tuckahoe, &c. R. R. Co.*, 11 Leigh, 42; *Illinois, &c. Canal Co. v. Chicago, &c. R. R. Co.*, 14 Ill. 314; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 63.

² *Parrott v. City of Lawrence, &c.*, 2 Dill. 832. Compare *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35.

³ *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116. Compare *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. 71; but see *Enfield Toll Bridge Co. v. Hartford, &c. R. R. Co.*, 17 Conn. 40.

privileges from the community but in consideration of public services."¹ Under this provision, the Court of Appeals held that the legislature had no power to authorize an incorporated building association to charge interest on loans at a greater rate than was allowed by the general laws of the State to individuals.²

But this provision of the Bill of Rights does not restrict the power of the legislature to grant an exclusive privilege to a corporation or an individual, in order to secure some benefit to the public at large. Thus, the legislature may confer upon a gas company the exclusive right of supplying a city with gas, because the company would thereby impliedly assume an obligation to supply the city with gas, and this would be a "public service" within the meaning of the exception to the constitutional prohibition.³ In *Gordon v. Winchester Building Association*, Judge Cofer said: "Permission to keep a tavern or a ferry, to erect a toll bridge over a stream where it is crossed by a public highway, to build a milldam across a navigable stream, and the like, are special privileges, and, being matters in which the public have an interest, may be granted by the legislature to individuals or corporations; but the grantee, upon accepting the grant, at once becomes bound to render that service to secure which the grant was made; and such obligation on the part of the grantee is just as necessary to the validity of a legislative grant of an exclusive privilege, as a consideration, either good or valuable, is to the validity of an ordinary contract. Whenever, by accepting such privilege, the grantee becomes bound, by an express or implied undertaking, to render service to the public, such under-

¹ Const. of Kentucky, 1799, Art. 10, § 1.

² *Gordon v. Winchester Building, &c. Ass.*, 12 Bush (Ky.), 110.

So a special law authorizing an individual to hold a lottery was held to be unconstitutional. *Commonwealth v. Whipps*, 80 Ky. 269.

Under a constitutional provision that "the legislature shall fix the

rate of interest, and the rate so established shall be equal and uniform throughout the State," the legislature cannot empower a corporation to charge interest at a rate greater than that established by general law. *McKinney v. Memphis, &c. Hotel Co.*, 12 Heisk. (Tenn.) 104.

³ *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 693.

taking will uphold the grant, no matter how inadequate it may be ; for the legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered in consideration therefor, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be.”¹

§ 1058. *Grants of Franchises cannot be altered indirectly.* — A right conferred by the State upon a corporation by contract cannot be impaired indirectly by subsequent legislation rendering the full enjoyment of the right impossible. Thus, if a canal company has been invested with the franchise to select and acquire land upon a certain route for the purpose of building the canal, the State cannot afterwards enable a railroad company to occupy difficult passes along the same route, so as to exclude the former company from the priority of choice.²

Nor can a State, after having authorized the formation of a corporation on condition that the company should assume certain duties or obligations, impose new obligations, or otherwise alter the terms of the grant. Thus, if a company was chartered to build a bridge, provided it keep “suitable draws, which shall be at least thirty feet wide,” the State cannot require different draws, if those built by the company be in fact suitable to circumstances, and at least thirty feet wide.³

§ 1059. *Laws impairing the Contract among the Shareholders.* — A law impairing the obligation of the contract existing among the shareholders of a corporation is unconstitutional, although it leave their franchises wholly untouched. Thus, a law altering the business or management of a corporation chartered by a foreign State would not be unconstitutional, because impairing the obligation of any grant of franchises, or contract between the shareholders and the State, for fran-

¹ 12 Bush (Ky.), 114.

² *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. 1. *Bridge Co.*, 2 Gray, 339; *Washington Bridge Co. v. State*, 18 Conn. 53; *Monongahela Nav. Co. v. Coon*,

³ *Commonwealth v. New Bedford* 6 Pa. St. 379.

chises are not operative beyond the jurisdiction of the State granting them;¹ yet a law of this character would be unconstitutional, because impairing the contract among the several members of the company. If a corporation were chartered by the State of New York for the business of life insurance only, its business could not be extended to fire insurance in Illinois, by virtue of a law of that State, against the will of a single shareholder.

A State cannot in any manner alter the mutual relationship among the members of a corporation, nor their relative rights and duties, as established by their voluntary agreement when the company was formed. Thus, a law purporting to authorize the majority to extend or alter the business of a corporation against the will of the minority would be unconstitutional, although it contain a grant of new franchises to the corporators, and no existing franchise be thereby impaired.²

A law altering the voting power of the shareholders in a corporation, thus impairing their control over their own enterprise, would clearly be unconstitutional;³ and the same would be true of a law imposing a liability to pay assessments which the shareholders did not agree to pay,⁴ or a law materially altering the powers of the directors, or changing the agencies by which a corporation is managed.⁵

§ 1060. A provision in a charter limiting its duration to a specified period of time has been construed as a limitation upon the continuance of the contract among the corporators. Hence a law compelling a corporation to continue its business after its charter has expired by its own limitation would be

¹ *Supra*, § 759.

² *New Orleans, &c. R. R. Co. v. Harris*, 27 Miss. 517, 536; *Clearwater v. Meredith*, 1 Wall. 39; *Mowrey v. Indianapolis, &c. R. R. Co.*, 4 Biss. 78; *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 46; *Zabriskie v. Hackensack, &c. R. R. Co.*, 18 N. J. Eq. 178; *Black v. Delaware, &c. Canal Co.*, 24 N. J. Eq. 467; and see *supra*, §§ 645, 646.

³ *State v. Greer*, 78 Mo. 188, overruling *s. c.* 9 Mo. App. 219, 224.

⁴ *Brown v. Fairmount Gold, &c. Mining Co.*, 10 Phila. 82. See *supra*, Chapter III., and compare *infra*, § 1078.

⁵ *Orr v. Bracken County*, 81 Ky. 593; *Dartmouth College v. Woodward*, 4 Wheat. 518.

unconstitutional.¹ So, if all the franchises of a corporation come to an end by forfeiture, or by voluntary dissolution of the company, the rights of the individual shareholders arising out of their mutual agreement would be protected by the Constitution of the United States from hostile State legislation.²

§ 1061. **Corporations are subject to the Laws of the State.**— It has been pointed out, that a corporation is merely an association of individuals, to whom the legislature has granted certain franchises or privileges by charter. It is clearly not the intention of the legislature, in incorporating a number of persons, to discharge them from the operation of the general laws of the land. There is no reason, then, why they should not remain subject to the general laws after incorporation as well as before, whether acting severally or jointly, or *in a corporate capacity*. It may therefore be stated as a rule, that the general laws determining the rights and duties of individuals apply to corporations, except when they are not in the nature of things applicable to corporations, or when they are rendered inapplicable by act of the legislature.

§ 1062. **Corporations are not exempt from Future Legislation.**— That corporations are subject to the law-making power of the State, to the same extent as unincorporated individuals, is obvious. When the legislature of a State grants to a number of persons the right of forming a corporate association, it clearly does not intend to emancipate them forever after from the law-making power of the State in respect of their corporate acts and rights;³ nor would the legislature

¹ *Supra*, § 418.

² *Supra*, §§ 1082, 1088.

³ It is well settled that any grant of a special privilege or immunity must be strictly construed, and that no presumption can be made in favor of the grant. It is clear, therefore, that a legal exemption from further general legislation, and, above all, a *contract* of exemption from further legislation, can never be implied. See *Thorpe v. Rutland*,

&c. R. R. Co., 27 Vt. 140, and cases cited; *Nelson v. Vermont*, &c. R. R. Co., 26 Vt. 717; *Branin v. Connecticut*, &c. R. R. Co., 81 Vt. 214; *Peters v. St. Louis*, &c. R. R. Co., 28 Mo. 107; *Gorman v. Pacific R. Co.*, 26 Mo. 441, 450; *Galena*, &c. R. R. Co. v. *Loomis*, 13 Ill. 548; *Beer Co. v. Massachusetts*, 97 U. S. 32; *Opinion of Justices*, 9 Cush. 604, 608.

have the power to do this.¹ The legislative powers of the States themselves are unrestrained, except by the limitations contained in the Constitution of the United States.

§ 1063. It would be wholly outside of the scope of this treatise to consider in detail to what extent the States are restricted by constitutional limitations in their power of legislation over private corporations. An inquiry of this character would involve going over the whole field of constitutional law; for all the important constitutional provisions regarding property and contract rights apply to *persons* under all circumstances, and therefore to persons who have formed a corporate association. The prohibition of the Constitution of the United States against State laws impairing the obligation of contracts is in no sense peculiar to corporations; but it may properly be considered in this connection, so far as its application involves an examination into the nature and constitution of corporations in general.²

§ 1064. **What Laws are Constitutional. — General Rules. —** In the preceding sections it has been pointed out that a charter of incorporation of a private company has been held to

¹ *Supra*, § 1052.

² It may be stated as a general rule, that every law which impairs the obligation of a contract is unconstitutional, and that it is immaterial in such case to what extent the contract has been impaired. *Green v. Biddle*, 8 Wheat. 84; *Von Hoffman v. City of Quincy*, 4 Wall. 551, 554; *Farrington v. Tennessee*, 95 U. S. 683.

A State cannot, by indirect means, avoid the application of a constitutional prohibition. Any law whose operation would impair the obligation of a contract is unconstitutional, though it profess to leave the contract unimpaired. Thus, the State cannot take away or materially impair the remedies for the enforcement of an existing contract. *Tennessee v. Sneed*, 96

U. S. 89; *Pritchard v. Norton*, 106 U. S. 124; *Antoni v. Greenhow*, 107 U. S. 769; *Edwards v. Kearzey*, 96 U. S. 595; *Planters' Bank v. Sharp*, 6 How. 301, 332.

Nor can the execution of a contract be made a punishable offence. *Bailey v. Philadelphia, &c. R. R. Co.*, 4 Harr. (Del.) 389. Compare *Sloan v. Pacific R. R. Co.*, 61 Mo. 24.

But a State may undoubtedly, by law, change the form of the remedies by which existing contracts may be enforced, and it may abolish special remedies altogether, provided an adequate remedy be substituted. See *Penniman's Case*, 103 U. S. 714; *Sturges v. Crowninshield*, 4 Wheat. 122; *Conkey v. Hart*, 14 N. Y. 22.

be within the protection of the constitutional prohibition against State laws impairing the obligation of contracts, for two reasons. These are, first, because a charter of incorporation involves a contract between the corporators and the State; and, secondly, because it involves a contract between the several corporators.

The character of the contract existing between the shareholders of a private corporation has been considered at length in the preceding chapters, and it has been pointed out that this contract is in many respects analogous to the contract existing between the members of a simple copartnership. Both classes of contracts are subject to the general legislative powers of the States, and both are equally within the protection of the Federal Constitution. In many cases, therefore, the constitutionality of State legislation affecting the charters of private corporations may be determined by reference to the same considerations as the constitutionality of similar legislation affecting ordinary articles of copartnership.

The franchise of acting in a corporate capacity, conferred by a charter of incorporation, is coextensive with the agreement between the members of the company. This franchise is merely a permission given by the legislature to the shareholders, enabling them to form a corporation, and to carry on the business for which they have agreed to unite in a corporate capacity. Hence, as a rule, any general legislation which does not impair the agreement entered into by the shareholders of a corporation with each other, does not impair their franchise of acting in a corporate capacity.¹

§ 1065. *The Power to pass Laws for the Government and Welfare of the Community.*—It is evident that the prohibition of the Constitution of the United States against State laws impairing the obligation of contracts was not intended to annihilate all legislative powers of the States with respect to existing contracts. The power to make laws for the welfare

¹ A law changing the name of a impair any of their franchises. corporation does not alter the con- Delaware, &c. R. R. Co. v. Irick, 3 tract between the shareholders, or Zab. 321.

and safety of the community is essential to the existence of every State ; and hence it cannot be supposed that it was the intention of the several States to limit this power, by assenting to the Federal Constitution.¹ Police laws for the protection of the community from nuisances and dangers, and regulations for the proper administration of public affairs and the easy attainment of justice, have universally been held valid. All ordinary contracts are subject to these general legislative powers of the States ; and no other rule is applicable to the contracts by which a private corporation is formed.

§ 1066. *The Power of the States to regulate particular Classes of Business.* — The extent to which a State can by legislation regulate the business and affairs of an association, whether it be incorporated or not, necessarily depends largely upon the nature of the business in which the association is engaged. Legislative powers extend over all matters of public interest ; but where the public are not interested, private rights cannot be interfered with.

If a particular kind of business or employment is of such a character, or of such magnitude, that the public are directly interested in its proper management, it falls within the legislative duties of the government to regulate the same. And under these circumstances the legislature cannot be ousted from its proper sphere of action by the fact that a number of individuals have agreed to form a copartnership or corporation for the purpose of carrying on the business in question. Thus, the public are obviously interested in a very high degree in the proper management and operation of railroads ; and hence the legislature may make rules and regulations for the proper management and operation of railroads, whether they be owned by corporations or not. The power of legislative interference is much more limited in case of companies formed for the purpose of carrying on employments in which the public are less directly concerned, such as manufacturing,

¹ See *per* Mr. Justice Daniel, in *Insurance Co. v. Needles*, 118 U. S. West River Bridge Co. v. Dix, 6 574, 580. How. 581, 582 ; *Chicago Life In-*

mining, or buying and selling. The constitutionality of the legislation generally depends upon the answer to the question, Was the legislation designed to accomplish some object of public interest?

§ 1067. **Laws for the Protection of Life and Property.** — It is clearly a part of the legislative duties of every government to pass laws for the protection of life and property within its jurisdiction. General laws passed in good faith for such a purpose are an exercise of the police power of the State, and do not impair the obligation of existing contracts. Thus, a State may require railroad companies, whether incorporated or not, to fence their tracks properly and maintain cattle-guards,¹ and to construct viaducts at crossings.²

It is also within the general legislative power of a State to compel railroad companies to put up sign-boards at crossings and to keep flagmen, to regulate the rate of speed at dangerous places, to compel all trains to be stopped at crossings, to require whistles to be blown and bells to be rung, &c.³

So it has been held that an ordinance of a city prohibiting a railroad company from propelling its cars by steam through a certain street in the city was a valid police regulation, and therefore impaired no constitutional right of the company.⁴

§ 1068. **Laws preventing Nuisances and other Acts injurious to the Public.** — The power of the States to pass laws for the prevention of nuisances and other acts injurious to the public

¹ *Thorpe v. Rutland, &c. R. R. Co.*, 27 Vt. 140; *Norris v. Androscoggin R. R. Co.*, 39 Me. 278; *Ohio, &c. R. R. Co. v. McClelland*, 25 Ill. 140; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Madison, &c. R. R. Co. v. Whiteneck*, 8 Ind. 217; *Kansas Pacific Ry. Co. v. Mower*, 16 Kans. 578; *Rockford, &c. R. R. Co. v. Hillmer*, 72 Ill. 235; *Chicago, &c. R. R. Co. v. People*, 105 Ill. 657; *State v. New Haven, &c. Co.*, 43 Conn. 351; *Mobile, &c. R. R. Co. v. State*, 51 Miss. 137; *Horn v. Chicago, &c. Ry. Co.*, 38 Wis. 463; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333; *Pittsburg, &c. R. R. Co. v. Southwest Pennsylvania Ry. Co.*, 77 Pa. St. 173; *Lake Shore, &c. R. R. Co. v. Cincinnati, &c. Ry. Co.*, 30 Ohio St. 604; *Veazie v. Mayo*, 45 Me. 560.

² *People v. Boston, &c. R. R. Co.*, 70 N. Y. 569.

³ *Galena, &c. R. R. Co. v. Loomis*, 18 Ill. 548; *Nelson v. Vermont, &c. R. R. Co.*, 26 Vt. 717; *Thorpe v. Rutland, &c. R. R. Co.*, 27 Vt. 140;

⁴ *Railroad Company v. Richmond*, 96 U. S. 521.

is clearly not restricted by the Federal Constitution, even though the execution of existing contracts be thereby prevented. Thus, a company incorporated under an act of the legislature, for the purpose of manufacturing fertilizers at a particular place, may subsequently be required by law to suspend its business entirely, or to remove it to another place, if carrying on the business should prove a nuisance at the place where it was located; and this would be true though the company's charter provided in express terms that it should "have continued succession and existence for the term of fifty years."¹

Such a provision could not reasonably be construed as a contract between the State and the shareholders that the company should not be subject to legislation for the prevention of nuisances. As between the State and the corporators, the charter was merely an enabling act authorizing the formation of a corporate association, to last during a period of fifty years. No one would claim that a law prohibiting a copartnership from carrying on a particular business, considered by the legislature to be a nuisance or otherwise injurious to the community at large, would be unconstitutional, even though the business was lawful when the company was formed, and the partners had agreed to continue the business for fifty years. Why should a different rule be applied to a joint-stock company or corporation, merely because the legal right to form such an association was conferred by the legislature, or because the legislature by its giving its consent made the business of the company lawful?

§ 1069. *Laws for the Protection of the People against the Evils of Spirituous Liquors.*—The case of *Beer Company v. Massachusetts*² presents a striking illustration of the general power of the States to enact laws for the good government of the community, although existing contracts be affected thereby. The question was, whether a general law forbidding the sale of spirituous liquors was unconstitutional, because impairing the charter of a company which had been previously

¹ *Fertilizing Co. v. Hyde Park*,
97 U. S. 659.

² *Beer Co. v. Massachusetts*, 97
U. S. 32.

incorporated for the purpose of manufacturing malt liquors in all their varieties. The Supreme Court of the United States held, unanimously, that the law was valid. Justice Bradley said: "The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors' in all their varieties,' it is true; and the right to manufacture undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor, nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."¹

In this case the corporation had not been expressly invested with an irrevocable right to be exempt from the operation of subsequent legislation affecting the liquor trade. A grant of such a right could clearly not be implied, even if it were within the power of the legislature.

The enactment of a prohibitory liquor law would evidently not be unconstitutional because impairing the contracts between the members of existing partnerships formed for the purpose of carrying on the liquor trade. There is no reason why a different rule should be applied to an agreement between corporators to carry on the same trade, merely because the legislature has given them the privilege of acting in a corporate capacity.

¹ *Beer Co. v. Massachusetts*, 97 U. S. 82. See also *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153; *Commonwealth v. Hamilton Manuf. Co.*, 120 Mass. 363; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Railroad Co. v. Richmond*, 96 U. S. 521. Compare *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191.

§ 1070. **Other Legislation which is Constitutional.** — A law prohibiting the employment of all persons under the age of eighteen, and of all women, in any manufacturing establishment for more than sixty hours per week, violates no contract impliedly contained in the charter of a manufacturing corporation. Such a law would be a valid exercise of the power of the State to enact laws to secure the health and education of the community.¹

So, a law providing that all railroad companies shall be liable for the wages due to day laborers employed by the contractors who have undertaken to construct the companies' railroads and works, would not impair the charter of an existing railroad company, nor take away its property without just compensation. Such a law, however, would apply only to wages accruing under construction contracts made by the companies thereafter.²

§ 1071. A State may by general laws regulate the use and disposition of property within its jurisdiction, although existing companies be thereby affected. Thus, a statute of wills is not unconstitutional because prohibiting devises to associations previously incorporated with authority to take property by devise, unless indeed they were expressly invested, by contract with the State, with an irrevocable right to receive future devises.³ A simple grant of authority to receive devises would not be such a contract; it would merely place the corporation in the position of an individual, or unincorporated association of individuals, in this respect.

§ 1072. **General Legislation relating to the Banking Business.** — The law upon this subject was stated clearly in an opinion rendered by the justices of the Supreme Court of Massachu-

¹ *Commonwealth v. Hamilton Manuf. Co.*, 120 Mass. 383. *pare also Lyman v. Boston, &c. R. R. Co.*, 4 Cush. 288; *Southwestern*

A law imposing a penalty for selling adulterated milk is valid. *Commonwealth v. Evans*, 132 Mass. 11. *R. R. Co. v. Paulk*, 24 Ga. 356; *Camden, &c. R. R. Co. v. Briggs*, 22 N. J. Law, 623; *Brown v. Penobscot Bank*, 8 Mass. 445; *Boston, &c. R. R. Co. v. State*, 32 N. H. 215.

² *Branin v. Connecticut, &c. R. R. Co.*, 31 Vt. 214; *Peters v. St. Louis, &c. R. R. Co.*, 23 Mo. 107. *Compare Ayres v. Methodist, &c. Church*, 8 Sandf. 351.

setts, in answer to a question submitted to them by the Senate. The question was: "Is the corporation known as the 'Provident Institution for Savings in the Town of Boston,' chartered in the year 1816, subject to the general laws of the Commonwealth relating to savings banks and institutions for savings, passed since the granting of the charter aforesaid?" The learned judges, after considering in detail what franchises had been conferred upon the corporation by its charter, said: —

"The legislature, by giving to the institution in Boston the privilege of being a corporation, and of managing its proper business, did not relinquish any power of legislating on all proper subjects of legislation. The institution at the time it was incorporated had the right and power, under the general laws, to loan money at six per cent interest; but there can be no doubt that the legislature could alter the law, so that the institution could take only four or five per cent interest. The corporation had power under its charter to hold and dispose of property; but there was nothing in the charter as to the mode, and of course the property could be held and disposed of only according to the general laws, which the legislature might at any time alter, and the corporation would be bound by the alteration.

"The corporation might indorse and negotiate promissory notes, but only according to the general laws, as there was nothing in the charter on the subject; but the legislature might change the whole law on this subject at any time, or take away altogether, by general laws, the right to indorse and negotiate notes, and these laws would be binding on the corporation. But it cannot be necessary to extend these illustrations. The legislature cannot be deprived of the power it holds for the public good, by any doubtful construction or remote inference.

"The position that the legislature has granted away any of its appropriate powers of legislation can be supported only by clearly showing such grant. In the present case, there appears to be nothing in the charter of the Provident Institution for Savings in Boston to exempt it from the provisions

of the general laws, passed since the date of the charter, relating to savings banks, prescribing the mode of investments; and the undersigned are therefore of opinion that that institution is subject to those provisions of those general laws."¹

§ 1073. *Railroads.*—The power of the States to enact laws for the regulation of railroad companies rests in part upon the obligations assumed by such companies in favor of the public. Railroad companies are generally built by taking private property through the power of eminent domain vested in the State; and the legislature can delegate this power only to secure a public benefit. A railroad company which exercises this power impliedly assumes an obligation to provide the public with the use of its railroad as a public highway, at reasonable charges.² Laws enacted by the State for the enforcement of this duty are therefore constitutional.

The public character of railways was clearly and forcibly stated by Judge Dillon as follows: "In all civilized countries the duty of providing and preserving safe and convenient highways to facilitate trade and communication between different parts of the State or community is considered a governmental duty. This may be done by the government directly, or through the agency of corporations created for that purpose. The right of public supervision and control over highways results from the power and duty of providing and preserving them. As to ordinary highways these propositions are unquestioned. But it is denied that they apply to railways built by private capital, and owned by private corporations created for the purpose of building them. Whoever studies the nature and purposes of railways constructed, under the authority of the State, by means of private capital, will see that such railways possess a twofold character. Such a railway is in part public and in part private. Because of its

¹ This opinion was signed by Chief Justice Shaw and Justices Dewey, Metcalf, Fletcher, Bigelow, and Cushing. 9 Cush. 604. *Com-pare Planters' Bank v. Sharp*, 6 How. 340; *Murdock v. Brown*, 6 Am. L. Reg. 690.

A State may enact a usury law applicable to existing corporations, although their charters give them general authority to fix the rate of interest. *Building, &c. Ass. v. Dorsey*, 15 S. Car. 462.

² *Infra*, § 1114 *et seq.*

public character, relations, and uses, the judicial tribunals of this country, State and national, have at length settled the law to be that the State, to secure their construction, may exert in favor of the corporation authorized by it to build the road both its power of eminent domain and of taxation. This the State cannot do in respect of occupations or purposes private in their nature. . . . In its public character, a railroad is an improved highway, or means of more rapid and commodious communication, and its public character is not divested by the fact that its ownership is private. . . . In its relations to its stockholders, a railroad, or the property in the road and its income, is private property, and, subject to the lawful or reserved rights of the public, is invested with the sanctity of other private property. The distinction here indicated marks with general accuracy the extent of legislative control, except where this has been surrendered or abridged by a valid legislative contract. Over the railroad as a highway, and in all its public relations, the State, by virtue of its general legislative power, has supervision and control; but over the rights of the shareholders, so far as these are private property, the State has the same power and no greater than over other private property.”¹

§ 1074. *Munn v. Illinois*. — *The Power of Regulating the Charges of Persons carrying on a Public Business*. — In the case of *Munn v. Illinois*, the Supreme Court of the United States decided that a law of the State of Illinois regulating and limiting the charges for the storage of grain in elevators within the State was not in violation of the Fourteenth Amendment of the Constitution of the United States, although the consequence of the law might be to impair the value of elevators and machinery previously acquired, by reducing the profits derived from their use. The court held that the Fourteenth Amendment was not designed to deprive the States of the power of enacting laws in relation to any

¹ *Chicago, &c. R. R. Co. v. Atty.-Gen. of Iowa*, 9 West. Jur. 847. 277; *Olcott v. Supervisors*, 16 Wall. 678; *Secombe v. Railroad Co.*, 23 Wall. 108. See also *Railroad Commissioners v. Portland, &c. R. R. Co.*, 63 Me.

subject which, before the adoption of the amendment, was regarded as a proper and customary subject of legislative control; and it was laid down as a general rule, that, "when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."¹

The amendment of the Constitution prohibiting the States from depriving any person of life, liberty, or property without due process of law, certainly did not take away the police power of the States, or, in other words, the power of enacting laws to protect life and property, and to secure the health and morality of the people;² and it is equally clear that this prohibition was not designed to abridge the power of the States to enact other general legislation for the welfare of the community, though the interests of particular individuals might be incidentally affected thereby. Thus, the power of the States to regulate interest on money and to enact usury laws was not taken away, and so it has been held that the power to pass laws regulating the charges of ferry owners, common carriers, hackmen, butchers, inn-keepers, and the like, was left unimpaired.³

It should be observed, however, that this question is simply one of construction, the object being to ascertain the true

¹ *Munn v. Illinois*, 94 U. S. 113, *per* Chief Justice Waite. See also *Hoyt v. Chicago, &c. R. R. Co.*, 98 Ill. 601. Compare *Ladd v. Southern Cotton Press, &c. Co.*, 58 Tex. 172.

² *Supra*, § 1052.

³ In *Munn v. Illinois*, 94 U. S. 125, Chief Justice Waite said: "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharf-ingers, inn-keepers, &c., and in so doing to fix a maximum of charges to be made for services rendered, accommodations rendered, and articles sold. To this day statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that they come within any of the constitutional prohibitions against interference with private property."

meaning of the constitutional amendment. No argument can be of service in solving this question, except by throwing light upon the purposes for which the amendment was passed. The prohibition is absolute in terms, and, as was pointed out by Justice Field in *Munn v. Illinois*, the right to enjoy life and liberty is guarded by no more stringent provisions than the right to enjoy property. It is reasonable to imply that the amendment was not designed to impair the power of the States to enact such laws as were by common consent, at the time of the adoption of the amendment, deemed within the proper and ordinary sphere of legislative action, even though private rights should thereby be interfered with; but it would not be reasonable to carry this implication further. The States have always the power to take private property, when the public interest demands this, by exercise of the power of eminent domain, upon providing just compensation.¹

§ 1075. *Corporations are not impliedly exempted from the Power of regulating Charges.*—It is plain that the property of corporations is no more exempt from the general legislative powers of the States, than the property of individuals. If a State law regulating the charges to be made by persons engaged in a particular business or employment would be constitutional, such a law would be equally constitutional if made applicable to corporations.

A State may by contract confer upon particular individuals and corporations, engaged in a business of a public character, an exemption from the general power of regulating charges, and, under these circumstances, any law passed in violation of the contract of the State would be unconstitutional. But the enactment of a charter or general law merely authorizing the formation of a company for the purpose of carrying on a particular business, would certainly not by implication confer an exemption. There would be no more ground for implying such an exemption in an act of incorporation than in a law authorizing the formation of a limited partnership.

¹ *Infra*, § 1086.

Accordingly, the Supreme Court held that the States have the same power of regulating the charges of incorporated railroad companies as other carriers for hire. Chief Justice Waite said: "Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn v. Illinois*, subject to legislative control as to their rates of fare and freight, unless protected by their charters. . . . This company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances."¹

§ 1075 a. It is well settled that a contract on the part of a State not to exercise its power of legislation can never be implied. Accordingly, the Supreme Court held, in *Stone v. Farmers' Loan and Trust Company*, that a railroad company did not acquire an exemption from the power of the State to regulate its charges for transportation by virtue of a provision in its charter, that "it shall be lawful for the company hereby incorporated from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad."²

Chief Justice Waite, delivering the opinion, said: "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what

¹ *Chicago, &c. R. R. Co. v. Iowa*, Co., 116 U. S. 307. See also *Railroad Commission Cases*, 116 U. S. 94 U. S. 161. See also *Peik v. Chicago, &c. Ry. Co.*, Id. 164; 807, 347, 352; *Ruggles v. Illinois*, 108 U. S. 526; *Ruggles v. People*, 91 Ill. 256; *Illinois Central R. R. Co. v. Illinois*, 108 U. S. 541; *Illinois Central R. R. Co. v. People*, 95 Ill. 313; *Georgia R. R. Co. v. Smith*, 70 Ga. 694. Compare *Mobile, &c. Ry. Co. v. Steiner*, 61 Ala. 559.

² *Stone v. Farmers' Loan, &c.*

is done amounts to a regulation of foreign or inter-state commerce. This power of regulation is a power of government, continuing in its nature, and, if it can be bargained away at all, can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. . . . The claim now is, that the State has surrendered the power to fix a maximum rate for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the State had in the matter before the charter, it retained afterwards."¹

A similar conclusion was reached in the construction of a charter which contained a provision "that the president and directors be, and they are hereby, authorized to adopt and establish such tariff of charges for the transportation of persons and property as they may think proper, and the same to alter and change at pleasure."²

§ 1075 b. *Legislation regulating the Charges of Companies which have received State Aid.* — Under the system of government adopted in the United States, the legislatures of the several States have no authority to aid private enterprises either by donations of property or funds belonging to the public, or by delegating the power of eminent domain, or by conferring monopolies or exemptions from taxation, except for the purpose of accomplishing some public good. A grant by the legislature of State aid to a private company is, therefore, always subject to the implied condition that the company shall assume an obligation to give the public the benefits in consideration of which the grant was made.³ A

¹ 116 U. S. 325, 330.

² *Stone v. Illinois Central R. R. Co.*, 116 U. S. 347.

³ See *infra*, Chapter XVI.

law enacted by the State to enforce the due performance of this obligation would clearly be constitutional.

The constitutionality of legislation compelling railroad companies to carry passengers and freight at reasonable charges may be sustained on this ground, even though the correctness of the rule laid down by the majority of the court in *Munn v. Illinois* may not be free from doubt. Railroad companies, having had the benefit of State aid in the form of land grants, or municipal donations, or through exercise of the power of eminent domain, are under a legal duty to supply the public with the means of transportation at reasonable charges, and legislation compelling the performance of this duty certainly does not deprive the companies of their property without due process of law.¹

The constitutionality of legislation compelling gas companies, water companies, telegraph companies, canal companies, bridge companies, and all other companies which have had the use of the power of eminent domain or other public aid, to supply the public with the facilities for which this aid was granted, *at reasonable rates*, rests upon the same ground. The power of the State to regulate the charges of a company is especially clear where the company has the benefit of State aid in the form of the grant of a monopoly or exclusive right.²

§ 1075 c. **A State cannot impose Charges which are less than reasonable.** — The power of the State to enact laws regulating the charges of railroad companies does not enable it to fix charges which are less than reasonable. Such legislation would be unconstitutional.

In *Stone v. Farmers' Loan and Trust Company*, Chief Justice Waite said: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.

¹ See the cases cited in the preceding section. Union Tel. Co. v. Axtell, 69 Ind. 199; State v. Bell Telephone Co.,

² State v. Columbus Gas Light &c. Co., 34 Ohio St. 572; Western

Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law. What would have this effect we need not say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides 'that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust.'"¹

§ 1075 *d.* **A State cannot interfere with Commerce among the States.** — It has been held that a State law regulating the charges for transportation from a point within the State to a point in another State is unconstitutional, because an interference with inter-state commerce, Congress having the exclusive power of regulating commerce among the States.² The Supreme Court has, however, decided that a law regulating the charges of a railroad company for business done wholly within the State is constitutional, although the company may have been incorporated under the laws of several States, for the purpose of carrying on business in each of them.³

§ 1076. **Laws providing new Remedies for the Attainment of Justice.** — It is clear that a State may at any time alter the laws regulating procedure, and provide new remedies for the attainment of justice, although they be applicable to corporations already in existence.⁴ A State may also impose penalties for the non-performance of duties which a corporation is under obligation to the public to perform.⁵

¹ *Stone v. Farmers' Loan, &c. Co.*, 116 U. S. 307, 331. Compare *Ex parte Koehler*, 23 Fed. Rep. 529.

² *Kaiser v. Illinois Cent. R. R. Co.*, 18 Fed. Rep. 151; *Louisville, &c. R. R. Co. v. Railroad Commission*, 19 Fed. Rep. 679; *Farmers' Loan, &c. Co. v. Stone*, 20 Fed. Rep. 270.

³ *Stone v. Farmers' Loan, &c. Co.*, 116 U. S. 333, 334.

⁴ *Railroad Co. v. Hecht*, 95 U. S. 170; *Crawford v. Branch Bank*, 7 How. 279; *New Albany, &c. R. R. Co. v. McNamara*, 11 Ind. 543; *Gowen v. Penobscot R. R. Co.*, 44 Me. 140; *Commonwealth v. Cochituate Bank*, 3 Allen, 42. See *supra*, § 814; *infra*, § 1080.

⁵ *Mobile, &c. Ry. Co. v. Steiner*, 61 Ala. 559; and see cases cited in the preceding section.

Upon the same principle, it has been held that a law is valid which provides that existing corporations shall maintain their organization, and continue able to sue and liable to be sued in a corporate capacity during a limited period after their dissolution, for the purpose of winding up their affairs. A provision of this nature violates no contract, and impairs no right of the corporators; its whole object is to provide a convenient remedy for those who are equitably entitled to the assets of the dissolved company.¹ Hence its application may properly be extended to foreign corporations, so as to secure the just distribution of any assets lying within the jurisdiction of the State passing the law.²

§ 1077. *New Remedies against Insolvent Companies.*— Upon the same principle, it follows that a State may enact laws to regulate insolvent companies. Laws enacted to secure a speedy winding up and dissolution of insolvent banking or insurance companies, and to provide a summary remedy to restrain their operations after they have become injurious to the public, merely provide new remedies for the enforcement of an undoubted right belonging to the State.³

The case of *Commonwealth v. Farmers and Mechanics' Bank*⁴ is an illustration of this doctrine. A statute had been passed, providing that bank commissioners should be appointed by the Governor for the purpose of visiting the banks; that they should have free access to the vaults, books, and papers of every bank, and possess power to examine its officers under oath; and that if, upon the examination of any bank, a majority of such commissioners should be of opinion that it was insolvent, or that its condition was such as to render its further progress hazardous to the public, and that it had exceeded its powers or failed to comply with all the

¹ *Foster v. Essex Bank*, 16 Mass. 174; *Lewis v. Bank of Kentucky*, 245; *Lincoln, &c. Bank v. Richardson*, 1 Greenleaf, 79; *Franklin Bank v. Cooper*, 36 Me. 179; *Nevitt v. Bank of Port Gibson*, 6 Sm. & M. 513, 521-531, 557-575.

12 Ohio, 182. Compare *Bank of Gallipolis v. Trimble*, 6 B. Monr. 590.

³ *Chicago Life Ins. Co. v. Needles*, 118 U. S. 574, 580, 583.

² *McGoon v. Scales*, 9 Wall. 81; *Stetson v. City Bank*, 2 Ohio St. &c. Bank, 21 Pick. 543.

⁴ *Commonwealth v. Farmers',*

rules, they might apply to any of the justices of the Supreme Court for an injunction to restrain such corporation from further proceeding with its business until a hearing had been had, and that such process should forthwith be issued by such justice.

It was objected that this law was unconstitutional, because granting an injunction, before a hearing, to restrain a bank from carrying on business would diminish the period for which the bank was entitled, under its charter, to act in a corporate capacity. But the Supreme Court of Massachusetts held that the law was valid, and a reasonable measure for the protection of the community at large. "When the law provides for the commencement of such a process, upon such probable grounds as shall be deemed sufficient to justify a well-founded apprehension of misconduct, it is not an arbitrary suspension of the corporate powers of the bank, but a species of compulsory process, analogous to the constant course of action in similar cases, designed to take the subject in controversy into the custody of the law during the inquiry, to prevent further progress in a course thus probably shown to be mischievous and dangerous, and to secure the means of affording redress to the sufferers, in case the misdemeanors alleged shall be found to exist."¹

§ 1078. **Laws making Shareholders individually liable for Debts thereafter created.**—Laws passed by a State, in the interest of the community, to regulate the business in which a corporation or copartnership is engaged, have generally been held to be constitutional. Laws of this character would not impair the contract between the shareholders or members of a company engaged in the business.

A far more immediate interference with private rights occurs where laws are passed altering the rights and duties of the individual members of a corporation or copartnership, as they stood when the association was originally formed.

¹ 21 Pick. 557, *per Shaw*, C. J. 461; *Ward v. Farwell*, 97 Ill. 598; See also *Nevitt v. Bank of Port Gib-* Chicago Life Ins. Co. *v. Auditor*, son, 6 Sm. & M. 528; *Commercial* 101 Ill. 82; *Atty.-Gen. v. North Bank v. State*, 4 Sm. & M. 439, *America Life Ins. Co.*, 82 N. Y. 172.

Laws of this description must be general in their operation; they must be regulations enacted for the welfare of the community, and must affect existing obligations only collaterally.

It has been held that a State might constitutionally enact a general law extending the individual liability of the shareholders in banking corporations for any debts thereafter incurred.¹ This seems very near being an unconstitutional interference with private rights. A law subjecting the shareholders to a liability to contribute more capital than they originally agreed to contribute would clearly be unconstitutional. The same would evidently be true of a law increasing the liability of shareholders to creditors under existing contracts. A law imposing a liability for debts thereafter incurred can be held valid only on the ground that it is a regulation of the company's business for the security of the community. In the exercise of this power the State might perhaps prohibit a corporation from incurring further debts unless sufficient security were provided by the shareholders, or unless the shareholders were willing to become individually liable. But it may be doubted whether the State could by law impose upon dissenting shareholders an individual liability for debts incurred *without their consent* by the majority, or by the company's agents. A similar question would arise if a law were passed making the special partners in an existing limited partnership liable to the same extent as the general partners for all future debts. Special partnerships might perhaps be abolished by law, without impairing the contracts of existing special partners;² but a State law

¹ Child v. Coffin, 17 Mass. 64; Marr v. Bank of West Tennessee, Gray v. Coffin, 9 Cush. 200; Stanley v. Stanley, 26 Me. 196; Coffin v. Rich, 45 Me. 507, 509; Hathorn v. Calef, 53 Me. 471, 488; Commonwealth v. Cochituate Bank, 3 Allen, 42. See, however, Covington v. Covington, &c. Bridge Co., 10 Bush (Ky.), 78; Ireland v. Palestine, &c. Turnpike Co., 19 Ohio St. 369; Steacy v. Little Rock, &c. R. R. Co., 5 Dill. 348, 380. Compare

Marr v. Bank of West Tennessee, 4 Lea, 578, 585.

If a corporation formed under a special charter increases its capital stock pursuant to a general law, this is in effect a reincorporation under such law, and the subscribers for the new shares will incur the liability prescribed by the general law. Tibballs v. Libby, 87 Ill. 142.

² Compare *supra*, § 1048.

making them general partners would probably be held to be unconstitutional.

§ 1079. **Special Legislation affecting Contracts.** — The power of a State to enact laws affecting existing contracts is, as a rule, limited to legislation of a general character. The fact that a law applies to particular persons or to particular rights only, is in itself an indication that it was not enacted in the exercise of that general power of legislation which was left unimpaired by the prohibition of the Constitution of the United States. If the State desires to sacrifice private rights for the benefit of the public, proper compensation should first be made.

However, the rule is not universal that legislation affecting existing contracts must be general in its nature. The good government of a community may require laws relating to particular classes of property or contracts, if they are of public importance.

Thus, laws regulating the liquor trade, or common carriers, or laws affecting particular classes of corporations only, may be passed without impairing existing contracts.¹ And it is not impossible to imagine cases in which a law particularly affecting the rights of a single corporation or individual would be an exercise of the unrestricted legislative powers of the State. Thus, if a railroad company should obtain a practical monopoly of the carrying trade in a State, this would certainly not oust the power of the legislature to make laws regulating the tariff of charges on railroads.

§ 1080. **Special Legislation for the Advancement of Justice.** — Laws passed for the protection of property and the enforcement of existing rights are always valid.² And it is no objection to legislation of this character that it is applicable only in a single case, and affects only a single person or corporation.

Thus, if a corporation is invested by its charter with the privilege of taking land after paying for it upon a valuation found by an inquisition, this would not prevent the State

¹ See *supra*, §§ 1066, 1069 *et seq.*

² *Supra*, § 1076.

from enacting a law setting aside an inquisition and granting a new trial or an appeal.¹

In the Sinking Fund Cases,² the majority of the Supreme Court of the United States held that the act of Congress providing that the Union Pacific and Central Pacific Railroad Companies should set aside a portion of their current earnings for the purpose of meeting a very large indebtedness payable at a future day, would have been valid as a reasonable regulation for the protection of the rights of bondholders and creditors, even if the power of alteration and amendment had not been expressly reserved in the companies' charters.

A statute of limitations providing that suits shall be brought within a specified time upon existing causes of action, is not unconstitutional, provided a reasonable time to bring suit be left.³ So an act, applicable to a single corporation, providing that a reorganization of the company and alteration of its charter shall become binding upon every shareholder and bondholder who shall not, within a prescribed time, file his dissent in writing, would be constitutional, provided a reasonable notice be given to dissenting parties, and a reasonable opportunity be given them to assert their rights.⁴

A law which gives legal validity and force to a contract or conveyance of property, which the parties intended to be binding, but which was legally invalid and unenforceable by reason of some positive rule of the law, would not violate any right secured by the Constitution of the United States.⁵

§ 1081. *Laws incorporated in a Charter may be repealed.* — The legislature of a State may incorporate, in a charter granted by it, laws for the government of the corporation in its relations to the community. Provisions of this character

¹ *Baltimore, &c. R. R. Co. v. Nesbit*, 10 How. 895, 400, 401. See also *Mississippi Ry. Co. v. McDonald*, 12 Heisk. (Tenn.) 54.

² *Sinking Fund Cases*, 99 U. S. 700, 724-726. See also *Louisville, &c. Turnpike Co. v. Ballard*, 2 Metc. (Ky.) 165.

³ *Terry v. Anderson*, 95 U. S. 628.

⁴ *Gilfillan v. Union Canal Co.*, 109 U. S. 401. Compare *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527.

⁵ *Gross v. United States Mortgage Co.*, 108 U. S. 477; *Satterlee v. Matthewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Pet. 88. And see *supra*, § 651.

are evidently not intended as part of the agreement among the shareholders, nor as grants of irrevocable franchises to the corporation.

Thus, a provision in a charter, that "Process on said company shall be served on the president, by leaving a copy to his address," may be altered. Chief Justice Waite said, "The provision is one which evidently belongs to remedies against the corporation, and not the grant of rights."¹ The same rule undoubtedly applies to provisions in a charter conferring special remedies against delinquent shareholders,² or regulating the manner of condemning land.³

A clause in the charter of a railroad company, providing that it shall be lawful for any county through which the road shall pass to subscribe for its stock, and issue bonds in payment therefor, may be repealed; for a provision of this character is intended as a municipal regulation merely, and not as an irrevocable right of the corporation.⁴

§ 1082. *Laws repealing the Right of transferring Franchises.*—A provision in a charter of incorporation authorizing the corporation to transfer its franchises has a twofold operation. Upon the grantees of the charter it confers a franchise or

¹ *Railroad Co. v. Hecht*, 95 U. S. 170, affirming *Cairo, &c. R. R. Co. v. Hecht*, 29 Ark. 661. See also *Gowen v. Penobscot R. R. Co.*, 44 Me. 140.

² *Ex parte Northeast, &c. R. R. Co.*, 37 Ala. 679; *Howard v. Kentucky, &c. Ins. Co.*, 13 B. Monr. 282; *Bank of Columbia v. Okely*, 4 Wheat. 285.

³ *Chattaroi Ry. Co. v. Kinner*, 81 Ky. 221; *Mississippi Ry. Co. v. McDonald*, 12 Heisk. (Tenn.) 54; *Baltimore, &c. R. R. Co. v. Nesbit*, 10 How. 395.

⁴ *Aspinwall v. County of Daviess*, 22 How. 377. Justice Nelson said: "The power or authority contained in the charter, and out of which the right in question is claimed to arise, is conferred upon the county, a public corporation or civil institution of government, and upon public officers employed in administering its laws; and the power or authority itself concerns this body in its public political capacity." See also *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *Covington, &c. R. R. Co. v. Kenton County Court*, 12 B. Monr. 144. Compare *Sala v. City of New Orleans*, 2 Woods, 188; and see *infra*, § 553.

After a county has subscribed for shares under the authority thus conferred, its contract of subscription cannot be impaired by law. *County of Moultrie v. Buckingham, &c. Savings Bank*, 92 U. S. 631. Compare *Dingman v. People*, 51 Ill. 281.

power, namely, that of appointing other persons with power to enjoy franchises similar to those previously enjoyed by themselves. To the persons so appointed by the corporation the provision would operate as an enabling act, by conferring the franchises nominally transferred.¹

Whether the power of appointment so conferred by the legislature is revocable or not, before it has been exercised, depends upon the intention of the legislature. It has been held that, unless the contrary has been expressly declared, a right to mortgage franchises incidental to the use of property will be deemed as irrevocable as the right to mortgage the property itself; but a right to mortgage the franchise of forming a corporation is a naked franchise, not secured by contract. In *Memphis Railroad Company v. Commissioners*,² Justice Matthews said: "In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law, and not of contract, and are therefore subject to modification or repeal. Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law, and not of contract."

§ 1083. *Laws conferring New Rights or Franchises.* — It is evident that a State may *authorize* a corporation to alter its original enterprise, and exercise new franchises to any extent, without impairing any contract between the State and the corporators or the agreement among the corporators themselves.³ The effect of such a law is merely permissive; it enables the corporation to exercise new powers without breach of the law, but it takes away no existing power, and affects no existing right. Whether the new franchises shall

¹ See *supra*, § 924.

² *Memphis R. R. Co. v. Commissioners*, 112 U. S. 621.

³ *Supra*, §§ 120, 399. General

incorporation laws frequently provide that existing corporations may reorganize under them.

be exercised would depend wholly upon the corporation itself. Neither the majority of the shareholders nor any of the agents of the company would be entitled to exercise these franchises unless authorized to do so, either through the original charter contract, or the subsequent unanimous consent of the shareholders.¹

§ 1084. *Laws discharging a Corporation from Duties.* — That a State may, without impairing any contract contained in the charter of a corporation, discharge the latter from the performance of duties which it owes to the State, or release it from disabilities imposed for the public good, is a proposition so obviously correct as to require no support of authorities.²

§ 1085. *The State may enact Tax Laws.* — It was not the intention of the framers of the Constitution of the United States to limit the several States in the exercise of any power which is essential to the good government and welfare of a community. Thus, the prohibition against State laws impairing the obligation of contracts does not take away the general legislative powers of the States, although existing contracts may be affected by their exercise. Nor is the power of levying taxes for the purposes of the government impaired by the prohibition against taking private property without due process of law, or without just compensation.³ The power of taxation is essential to the existence of the government, and to enable it to secure the means of accomplishing the purposes for which it was created. Corporations are clearly subject to the power of taxation, to the same extent as individuals.

¹ *State v. Butler*, 18 Lea (Tenn.), 400, 404.

In *Zabriskie v. Hackensack, &c. R. R. Co.*, 18 N. J. Eq. 184, Chancellor Zabriskie said: "The supplement of 1861 is a perfectly valid and constitutional act. It is a grant of privileges that the legislature have a right to grant, as they could grant to this corporation the right to conduct a banking or insurance business, or to run a ferry

across the North River; but the company is restrained by the law of corporations and partnerships from expending the money or using the credit of the corporation in such enterprises, unless every shareholder consents." Compare *Sprigg v. Western Tel. Co.*, 46 Md. 67.

² Compare *supra*, § 400.

³ *Pine Grove v. Talcott*, 19 Wall. 666; *Talcott v. Pine Grove*, 1 Flipp. 120.

But the power of taxation can be exercised only to accomplish *public purposes*; to levy a tax for any purpose which is not properly governmental, would be to take private property without just compensation in violation of the Constitution. Justice Miller said: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. . . . We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a *public purpose*. It may not be easy to draw the line in all cases, so as to decide what is a public purpose in this sense, and what is not. It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use; and the courts can only be justified in interposing when a violation of this principle is clear, and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal."¹ Accordingly, it was held that a State could not empower a municipal government to levy taxes to aid and encourage the establishment of manufactories, or other purely private enterprises, within the State.²

§ 1086. *The Power of Eminent Domain.*— Upon the same principle, it has been held that the power of the States to take private property for public uses, by exercise of the right of

¹ 20 Wall. 684.

of Jay, 60 Me. 124; *Lowell v. Boston*, 111 Mass. 454; *Jenkins v. Andover*, 108 Mass. 94.

² *Loan Association v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; *Allen v. Inhabitants*

eminent domain, remains unimpaired by the Constitution of the United States. In *West River Bridge Co. v. Dix*, Justice Daniel, delivering the opinion of the court said:—

“This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. The Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its language as the supreme law for their government, can by no rational interpretation be brought to conflict with this attribute of the States; there is no express delegation of it by the Constitution, and it would imply an incredible fatuity in the States to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in no wise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.”¹

The power of eminent domain belongs to the Federal government of the United States, within its constitutional sphere of action, as well as to the several States;² the existence of this power is essential to every sovereign government.

§ 1087. *Conditions of the Exercise of the Power.*—The Constitution of the United States prohibits the Federal gov-

¹ *West River Bridge Co. v. Dix*, 6 How. 531–533. Upon the general subject of the right of eminent domain, consult Cooley on Constitutional Limitations, *523–*571; Mills on Eminent Domain; 2 Sedgwick on Damages, 565; 2 Dillon on Municipal Corporations, ch. xvi. §§ 583–625.

In *Boom Company v. Patterson*, 98 U. S. 403, 406, Justice Field, delivering the opinion of the court, said: “The right of eminent do-

main,—that is, the right to take private property for public uses,—appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several States, providing for just compensation for property taken, is a mere limitation upon the exercise of the right.”

² *Kohl v. United States*, 91 U. S. 367.

ernment and the several States from taking private property without due process of law ; and similar prohibitions in the State constitutions have from the earliest times limited the powers of the State legislatures.¹ The exercise of the power of eminent domain, either under an act of Congress or a State law, is, therefore, always subject to two conditions: first, the purpose for which the property is taken must be a public purpose ; secondly, just compensation, to be fixed by some tribunal, must be made to the owner of the property.²

§ 1088. *Any Property or Rights may be taken under the Power of Eminent Domain.*—Contracts, as well as tangible property, may be taken by virtue of the power of eminent domain vested in the government. And even rights derived from the States themselves are subject to this power. All contracts and grants made by a State must be deemed subject to the implied condition that they may be revoked, upon making just compensation, whenever this is required for the public good.

In *West River Bridge Co. v. Dix*, the Supreme Court of the United States decided that the franchises of a corporation might thus be extinguished. "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more. . . . A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the State, we regard as occupying the same position with respect to the paramount power and duty of the State to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the State ; and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract."³

¹ See *supra*, § 1044.

² Cooley on Constitutional Limitations, *580, *559; *Re Deansville Cemetery Ass.*, 66 N. Y. 569; *Davidson v. New Orleans*, 96 U. S. 97;

Pennsylvania R. R. Co. v. Baltimore, &c. R. R. Co., 60 Md. 268.

³ *West River Bridge Co. v. Dix*, 6 How. 507, 534, and cases cited; s. c. 16 Vt. 446; *Richmond, &c.*

"There is no contract that the corporation may not be dissolved, or its operations suspended by a subsequent exercise of the power of eminent domain, if the property, franchise included, is of such a nature that that power may operate upon it."¹

§ 1089. The property and privileges belonging to individual members of a corporation are subject to the power of eminent domain, to the same extent as the property and privileges belonging to the corporation collectively; and in the exercise of this power a State may enable any portion of the shareholders in a corporation to dissolve their association and consolidate with another company, or to engage in an entirely new enterprise, upon making just compensation to such shareholders as are not willing to accept the change.

Thus, in *Black v. Delaware and Raritan Canal Co.*,² it was held that an act authorizing a majority of the shareholders in a corporation to consolidate with another company, upon paying to dissenting shareholders the full value of their shares, was constitutional and valid. The court admitted that the proposed consolidation would work a fundamental change in the constitution of the company, and fully recognized the general rule of law, that the contract between the several members of a corporation cannot be altered by the majority, even with the consent of the legislature; but it was decided that the consolidation might be effected by exercise

R. R. Co. v. Louisa R. R. Co., 13 How. 83; *New Orleans Gas Co. v. Philadelphia, &c. Ry. Co.'s Appeal*, 102 Pa. St. 123.
Louisiana Light Co., 115 U. S. 656;
Crosby v. Hanover, 36 N. H. 420;
Boston, &c. R. R. Co. v. Salem, &c. R. R. Co., 2 Gray, 1; *Central Bridge Co. v. City of Lowell*, 4 Gray, 481; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 36; *Red River Bridge Co. v. Mayor, &c. of Clarksville*, 1 Sneed, 176; *Delaware, &c. Canal Co. v. Raritan, &c. R. R. Co.*, 16 N. J. Eq. 866; *Shorter v. Smith*, 9 Ga. 517; *James River, &c. Co. v. Thompson*, 3 Gratt. 270;
Matter of Kerr, 42 Barb. 119; *In re Towanda Bridge Co.*, 91 Pa. St. 216;
Backus v. Lebanon, 11 N. H. 23.
² *Black v. Delaware, &c. Canal Co.*, 24 N. J. Eq. 455.

A State may, by virtue of this power, authorize a railroad company to condemn a crossing over the road of another railroad company, although the latter company was chartered by the Federal government. *Northern Pacific R. R. Co. v. St. Paul, &c. Ry. Co.*, 1 McCrary, 302; *Union Pac. Ry. Co. v. Burlington, &c. R. R. Co.*, 1 McCrary, 452.

of the power of eminent domain belonging to the State. Van Syckel, J., delivering the opinion of the court, said:—

“From the conclusions thus far reached, does it result that one unwilling stockholder may obstruct the growth and development of every enterprise of this character in which he may have participated, and thus hinder the union under one management of these important public highways, which have been constructed at different periods and under separate charters, when the necessities of inter-state commerce and the convenience of public travel may unite in urging it? Shall a railroad from Philadelphia to Trenton never be extended so as to connect the two great cities of our Union while one obstinate associate stands in the way?

“The necessity for rapid and speedy transit seems to demand imperatively that this difficulty shall not be insurmountable.

“In the exercise of the right of eminent domain, the legislature may authorize shares in corporations and corporate franchises to be taken for public uses, upon just compensation. The title to this species of property is no more secure against invasion, when the public uses require it, than is the ownership of real estate.”¹

§ 1090. *The Legislature cannot bind the State not to exercise this Power.*—The power of eminent domain is essential to the welfare of the State; and no legislature has authority to bind the State not to exercise this power if a proper case for its exercise should arise. “It is an inherent element of sovereignty; and from the necessity of the case and the highest considerations of public welfare, it must continue unimpaired in the State. It is impliedly reserved in every grant. It cannot be abridged so as to bind future legislation.”²

¹ 24 N. J. Eq. 468; s. c. 22 N. J. Eq. 416; Philadelphia, &c. R. R. Co. v. Catawissa R. R. Co., 58 Pa. St. 20, 61, 62. Compare *Lauman v. Lebanon Valley R. R. Co.*, 80 Pa. St. 42.

corporation has not engaged in business, there would ordinarily be no loss to compensate.

² *Per* Colt, J., in *Eastern R. R. Co. v. Boston, &c. R. R. Co.*, 111 Mass. 125, 131. See also *Cooley on Constitutional Limitations*, 342-344 (4th ed.); *East Hartford v.*

Where the shareholders have paid nothing on their shares, and the

§ 1091. **What Statutes are applicable to Corporations.**—Whether a general statutory enactment, not expressly referring to corporations, shall be applied to corporations, or only to individuals or unincorporated associations, is in all cases a question of construction. *Prima facie*, every law which in its nature is applicable to an association must be held to apply to corporations as well as to unincorporated associations. Thus, all laws relating to property rights, contracts, or procedure, apply to corporations, unless the contrary appears. And this presumption is not rebutted by the use of the word "persons" or "individuals" in the statute, without mention of corporations; indeed, as a corporation is merely an association of persons or individuals authorized by law to act as a single person, it would be within the letter of a law referring expressly to "persons."¹

It has therefore been held that tax laws expressly made to apply to "persons," or "individuals," or "inhabitants," must also be applied to corporations.² And a law regulating practice or procedure, and referring to "persons" or "residents," includes corporations as well.³ So, general laws

Hartford Bridge Co., 17 Conn. 93; La Farge v. Exchange Fire Ins. Co., 22 N. Y. 353; People v. Utica Ins. Co., 15 Johns. 358, 382; International L. Ass. Co. v. Commissioners, 28 Barb. 318; Ontario Bank v. Bunnell, 10 Wend. 186; Baldwin v. Trustees, 37 Me. 369; Cortis v. Kent Waterworks Co., 7 B. & C. 314. Compare Hartford Fire Ins. Co. v. Hartford, 3 Conn. 15.

¹ See *supra*, §§ 1, 7. *Beaston v. Farmers' Bank*, 12 Pet. 102; *United States v. Amedy*, 11 Wheat. 392, 412; *White v. State*, 69 Ind. 273; *People v. Utica Insurance Co.*, 15 Johns. 382; *Planters', &c. Bank v. Andrews*, 8 Porter, 404. Compare, however, the *dicta* in *School Directors v. Carlisle Bank*, 8 Watts, 291; *Blair v. Worley*, 1 Scam. 178; and see *Commonwealth v. Phoenix Bank*, 11 Metc. (Mass.) 129; *Pennsylvania R. R. Co. v. Canal Comm'rs*, 21 Pa. St. 9; *Androscoggin Water Power Co. v. Bethel Steam Mill Co.*, 64 Me. 441; *Cumberland, &c. Canal Co. v. Portland*, 56 Me. 78.

² *Otis Co. v. Ware*, 8 Gray, 509;

³ *Knox v. Protection Ins. Co.*, 9 Conn. 430; *Mayor of Mobile v. Rowland*, 26 Ala. 498; *Planters', &c. Bank v. Andrews*, 8 Porter, 404; *Trenton Bank v. Haverstick*, 6 Halst. 171; *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; *City of St. Louis v. Rogers*, 7 Mo. 19; *Bushel v. Commonwealth Ins. Co.*, 15 S. & R. 176; *Ealava v. Ames Plow Co.*, 47 Ala. 384; *Brauser v. New England Fire Ins. Co.*, 21 Wis. 506; *Bristol v.*

affecting contracts are applicable to corporations, although persons only be mentioned.¹ And corporations are "inhabitants" and "occupiers," within the purview of laws relating to real estate.²

In *Regina v. Arnaud*,³ the Court of Queen's Bench decided that a British corporation, whose shareholders were in part foreigners, was entitled to have a vessel owned by it registered under a statute limiting the right of registry to such vessels as "shall wholly belong and continue wholly to belong to her Majesty's subjects"; and further providing that no foreigner should be "the owner, in whole or in part, directly or indirectly," of any vessel entitled to be registered. Lord Denman said: "It appears to us that the British corporation is, as such, the *sole owner* of the ship, and a British subject within the meaning of the fifth section, as far as such term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company; and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel."

§ 1092. However, a statutory provision in terms applicable to any "person" or number of "persons" will not be held

Chicago, &c. R. R. Co., 15 Ill. 436; Bank of North America v. Chicago, &c. R. R. Co., 82 Ill. 493; Western Transportation Co. v. Scheu, 19 N. Y. 408; Brown v. Mayor of New York, 66 N. Y. 385; People v. Schoonmaker, 63 Barb. 44. Compare Cook v. Hager, 3 Col. 386; Olcott v. Tioga R. R. Co., 20 N. Y. 210; Blossburg, &c. R. R. Co. v. Tioga R. R. Co., 5 Blatchf. 387; Connecticut, &c. Ins. Co. v. Duerson, 28 Gratt. 631.

If a statute requires a party to an action to make an affidavit, the affidavit may be made by agent in case of a corporation. *Trenton Bank v. Haverstick*, 6 Halst. 171; *Planters', &c. Bank v. Andrews*, 8 Porter, 404; and cases *supra*. Com-

pare *Vogle v. New Granada Canal, &c. Co.*, 1 Houst. 294; *Holland v. Leslie*, 2 Harr. (Del.) 306; *Mix v. Andes Ins. Co.*, 74 N. Y. 53.

¹ *Mott v. Hicks*, 1 Cow. 513; *State of Indiana v. Woram*, 6 Hill, 33; *State v. Nashville University*, 4 Humph. 157; *Commercial Bank v. Nolan*, 8 Miss. 508.

² *Cortis v. Kent Water-Works Co.*, 7 B. & C. 314; *State v. Nashville University*, 4 Humph. 157; *Rex v. Gardner*, Cowper, 79; *Lehigh Bridge Co. v. Lehigh Coal, &c. Co.*, 4 Rawle, 8. Compare *Blair v. Worley*, 1 Scam. 178.

³ *Regina v. Arnaud*, 9 Q. B. 806, 817. Compare *Durant v. Kennett*, L. R. 5 C. P. 262.

to apply to corporations, if the context shows that only persons in their individual capacities were intended.¹

It is clear that a corporation is not itself a *citizen*, although it be composed of individuals who are citizens.² Hence, it has been decided that a corporation is not a citizen, within the meaning of the constitutional provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."³ But, on the other hand, it is equally well settled that a corporation must be treated as if it were a citizen, in giving effect to the constitutional provision and acts of Congress determining the jurisdiction of the Circuit Courts of the United States.⁴

PART II.

THE EFFECT OF A RESERVATION OF POWER TO REPEAL OR ALTER A CHARTER.

§ 1098. *Reservation by the State of Power to repeal or alter Charters.*—It is now the custom in the United States to provide in charters of incorporation and general incorporation laws, that the State shall have the right to repeal, alter, or amend them at pleasure. These provisions came into general use after the decision of the Dartmouth College Case, and were designed to obviate the rule supposed to have been established by that case.⁵ It is necessary, however, in considering the effect of these provisions, to bear in mind that the true scope and bearing of the decision in the Dartmouth College Case were not clearly appreciated at the time when

¹ *United States v. Fox*, 94 U. S. 315; *Matter of Fox*, 52 N. Y. 580; *State of Georgia v. Atkins*, 35 Ga. 315; *The Alabama Certificates*, 12 Op. Atty.-Gen. 176; *United States v. Railroad Company*, 17 Wall. 328.

A corporation cannot be a rebel, within the meaning of the United States confiscation acts. *Risley v. Phoenix Bank*, 83 N. Y. 318.

² See *Bank of U. S. v. Deveaux*, 5 Cranch, 86, 87; *Lafayette Ins. Co. v. French*, 18 How. 405; *Muller v. Dows*, 94 U. S. 445.

³ *Supra*, § 970.

⁴ *Supra*, § 975.

⁵ *Greenwood v. Freight Co.*, 105 U. S. 13, 20, 21. See *infra*, § 1097.

these provisions first came into general use. The contemporaneous utterances of the courts show plainly that the real constitution of a corporation, the functions of a charter, and the nature of the contract which a charter contains, were not at that time fully understood.

§ 1094. **Such a Reservation negatives the Existence of a Contract not to repeal Franchises.** — A reservation of the right to repeal, alter, or amend the charter or franchises of a corporation negatives any intention on the part of the State to confer irrevocable rights upon the corporators. Under such a reservation, the franchises must be regarded as simple legal powers, resulting from an enabling act of the legislature, not as rights secured by contract with the State. They may, therefore, be subsequently repealed or altered by the State in the exercise of its legislative powers.

A reservation of the right to "repeal" the charter or general law under which a corporation was formed, is evidently designed to give the State the power of dissolving the corporation, and rendering the future transaction of its business illegal,¹ although that would not, strictly speaking, be the result of a simple repeal of the law under which the corporation was formed.²

Special privileges or immunities conferred by the State upon the corporation may undoubtedly be repealed under a reservation of this character. Thus, an exemption from taxation granted to a corporation may be revoked.³ If a railroad company has authority by its charter to charge such tolls "as it may deem reasonable," this privilege may be withdrawn, and the company will thereafter be subject to the same degree of legislative control as other public carriers.⁴

The case of *Spring Valley Water-Works v. Schottler* is an important authority upon this subject. It arose upon the following facts. By the constitution of California, adopted

¹ *Greenwood v. Freight Co.*, 105 U. S. 13.

² *Infra*, § 1110.

³ *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Co. v. Maine*, 96 U. S. 507; *State v. Maine Central R. R. Co.*, 66 Me. 488.

⁴ *Shields v. Ohio*, 95 U. S. 319; s. c. 26 Ohio St. 86; *Parker v. Metropolitan R. R. Co.*, 109 Mass. 506; *Stone v. Wisconsin*, 94 U. S. 181. Compare *Hamilton v. Keith*, 5 Bush, 458.

in 1849, it was provided that all acts of incorporation passed by the legislature should be subject to a reserved power of repeal or alteration. The legislature enacted a general law for the formation of corporations to supply cities with water, and it was provided by this act that the rates to be charged for the water supplied by a corporation formed under the act should be fixed by a board of commissioners, to be appointed in part by the corporation and in part by the municipal authorities. Subsequently, the constitution and laws of the State were changed, so as to take away from existing corporations the right of appointing commissioners, and to give to the municipal authorities the entire power of fixing the rates to be charged by the companies. The Supreme Court of the United States held that this legislation did not impair any constitutional right of a company formed under the prior laws. Chief Justice Waite, delivering the opinion of the court, said: "The provision for fixing rates cannot be separated from the remainder of the statute by calling it a contract. It was a condition attached to the franchises conferred on any corporation under the statute, and indissolubly connected with the reserved power of alteration and repeal."¹

§ 1095. *The Power of Alteration gives the State control over the Corporate Affairs.* — The object of a reservation by the State of power to alter or amend the charter of a corporation is, not only to enable the State to alter *the franchises* of the corporation, but also to give the State a greater measure of control over the business and affairs of the corporation than could be exercised by virtue of the sovereign powers of legislation which were not relinquished in assenting to the Constitution. Such a reservation is designed to enable the State, to a certain extent, to dispose of the corporate funds, and to interfere with the agreement among the shareholders.

¹ *Spring Valley Water-Works v. Schottler*, 110 U. S. 347. Justice Field delivered an elaborate dissenting opinion.

than reasonable rates. The company, having had the use of the power of eminent domain for the construction of its works, could not be empowered by any legislature to charge more than reasonable rates.

It should be observed that the question did not arise in this case whether the rates established by the municipal authorities were less

When the legislature enacts a charter or general incorporation law containing a reservation of the power of alteration, it in effect authorizes the formation of a corporation only on condition that the shareholders shall consent that the State may exercise such control over the company as the power of alteration implies; and the persons forming a corporation under such a charter or law must be held to assent to this condition, and voluntarily to confer the power upon the State. The power to make an alteration under such a reservation, therefore, results from a contract or treaty between the State and the members of the corporation. The members of the company do not thus bargain away their constitutional rights, or increase the sovereign power of the State; they merely grant to the State a limited control over the business and affairs of the company, in consideration of the franchises conferred by the State.

In some instances the State has in terms reserved power to repeal, alter, or amend "the franchises" of a corporation. Such a reservation, strictly construed, would not give the State power to interfere with the agreement among the shareholders, or alter the uses of the corporate funds; but such a reservation is evidently intended to mean the same thing as a reservation of power to repeal, alter, or amend "the charter," or, in other words, to give the State general control over the management of the corporate affairs.

§ 1096. *The Extent of the Power of Alteration.* — It is often a difficult matter to determine how far the State has a right to interfere with the affairs of a corporation under a reservation of power to "alter, amend, or modify" its charter at pleasure. A reservation of this nature does not give the State arbitrary control over the rights and property belonging to a body of corporators. This is not the meaning of the words "alter, amend, or modify." A material *change* in the enterprise of a corporation is not a mere *alteration* or *amendment*. An alteration under such reserved power must be reasonable, and it must always be consistent with the scope and object of the corporation as it was originally agreed upon.¹

¹ *Shields v. Ohio*, 95 U. S. 819, 324, *per Justice Swayne*.

Chancellor Zabriskie said: "The power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must remain to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration: it is a change."¹

However, the legislature may impose an entirely new charter *as an alteration*, if the change made by the new charter be no greater than could have been brought about by an "alteration."²

§ 1097. *Purposes of the Reservation.*—It is clear that the courts cannot inquire whether it be expedient, in a given case, to exercise a right reserved to the State to repeal or alter the charter of a corporation.³ But it is proper, and even essential, in construing a legislative provision reserving the power of alteration or repeal, to consider the purposes for which the reservation was made.

It seems generally conceded, that the sole object of reserving to a State control over charters granted by it was to obviate the application of the decision in the Dartmouth College Case, which determined that a charter is a contract, and therefore protected by the Constitution of the United States. But it was not intended by any reservation in a charter or a general law to withdraw the legislature of a State from its properly legislative duties, and make it the arbiter

¹ Zabriskie v. Hackensack, &c. Callaway v. Foster, 93 U. S. 571, R. R. Co., 18 N. J. Eq. 192. 572.

² Sprigg v. Western Tel. Co., ³ American Coal Co. v. Consolidation Coal Co., 46 Md. 78. And see County of

over private rights. It is not the purpose of a provision of this nature to give the legislature of a State fatherly control over the affairs of private corporations. The right is reserved for the benefit of the public, and can be exercised only *for public purposes*.

In the Sinking Fund Cases, Justice Bradley said: "It seems to me that this clause has been greatly misunderstood. It is a sort of proviso peculiar to American legislation, growing out of the decision in the Dartmouth College Case. . . . In my judgment, the reservation is to be interpreted as placing the State legislature back on the same platform of power and control over the charter containing it as it would have occupied had the constitutional restriction about contracts never existed; and I think the reservation effects nothing more."¹

§ 1098. The nature of a corporation is, therefore, an important consideration in determining the extent of the reserved right of the State to alter or amend its charter. In some corporations the public is interested, in others it is not; and the right of interfering in their management varies accordingly. The legislature of a State is authorized to alter the charter of a corporation, or interfere in its management, without the consent of the shareholders, only so far as the welfare and convenience of the public may require.

Thus, the public are directly interested, to a very great extent, in the construction and operation of railroads in a

¹ Sinking Fund Cases, 99 U. S. 466, 476. See also *Holyoke Co. v. Lyman*, 15 Wall. 500, 522; *Zabris-
kie v. Hackensack, &c. R. R. Co.*,
18 N. J. Eq. 178; *State v. Comm'r
of Railroad Taxation*, 37 N. J. Law,
228; *West Wisconsin Ry. Co. v.
Board of Supervisors*, 35 Wis. 257;
Sprigg v. Western Tel. Co., 46 Md.
77; *Pennsylvania College Cases*, 18
Wall. 213; *Atty.-Gen. v. Railroad
Companies*, 35 Wis. 569-577, and
cases cited.

v. Glenwood Cemetery, 107 U. S.

safe and convenient manner, while the management of an incorporated mining or trading company is ordinarily a matter of private concern only. Hence it seems but reasonable that a reservation of the power to alter or amend the charter of a railroad company should be construed so as to give the legislature power to regulate many details in the management of the corporation and the use of its property, which would be wholly beyond the control of the State under a similar reservation of power in the charter of an ordinary mining or trading company.

It is obviously impossible to state any general rule by which the exact extent of change which the legislature can make in the business of a corporation, by virtue of a power to alter or amend its charter, can be determined. Each case must necessarily depend largely upon its peculiar circumstances, and require the exercise of much judicial discretion.

§ 1099. A reservation of power to repeal, alter, amend, or modify the charter of a railroad company, does not enable the legislature to compel the company to build a road essentially differing from that originally planned.¹ But under such a reservation a railroad company may be compelled to lengthen its road so as to make connection with another road in the same town,² and to build an extension to the main line, if this be not a material change in the enterprise of the company.³ And it seems that the legislature may even prescribe in what manner and under whose supervision the work of a required alteration shall be done, and how it shall be paid for.⁴ A railroad company may also be required to build a double track, change its grade, alter its bridges, and build station-houses or other structures, for the safety and convenience of the public.⁵

¹ *Zabriskie v. Hackensack, &c.* R. R. Co., 18 N. J. Eq. 178. See also *Bauk v. City of Charlotte*, 85 N. Car. 433.

² *Mayor of Worcester v. Norwich, &c. R. R. Co.*, 109 Mass. 113; *Shields v. Ohio*, 95 U. S. 325.

³ *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 348, 354.

⁴ *Fitchburg R. R. Co. v. Grand Junction R. R., &c. Co.*, 4 Allen, 198, 205.

⁵ *Zabriskie v. Hackensack, &c. R. R. Co.*, 18 N. J. Eq. 186; *Du-*

Railroad companies may even be consolidated under a reservation of power to alter their charters, provided such consolidation produce no radical change in the enterprises of the several companies, and be not unfair to any portion of the shareholders.¹

A reservation of the right to alter or amend the charter of a bank enables the legislature to impose upon its shareholders an additional liability for future debts, by virtue of a law applicable to banks in general.²

A manufacturing company having authority to maintain a dam across a river may be compelled to build fishways for the passage of fish up and down the river.³

§ 1100. *The Sinking Fund Cases.* — In the Sinking Fund Cases,⁴ the law upon this subject was carefully considered by the judges of the Supreme Court of the United States. The question was whether Congress had constitutional power to

rand v. New Haven, &c. Co., 42 Conn. 211; Commissioners v. Holyoke Water Power Co., 104 Mass. 452; Fitchburg R. R. Co. v. Grand Junction R. R. &c. Co., 4 Allen, 198.

"Whatever may be its limitation, it at least reserves to the legislature the right to make any reasonable amendments regulating the mode in which the franchise granted shall be used and enjoyed which do not defeat or essentially impair the object of the grant, or take away any property or rights which have become vested under a legitimate exercise of the powers granted." *Parker v. Metropolitan R. R. Co.*, 109 Mass. 508.

¹ Compare *Nugent v. Supervisors*, 19 Wall. 241; *Bishop v. Brainerd*, 28 Conn. 289; *McCray v. Junction R. R. Co.*, 9 Ind. 358, 359; *Booe v. Junction R. R. Co.*, 10 Ind. 93; *Hanna v. Cincinnati, &c. R. R. Co.*, 20 Ind. 80; *Bish v. Johnson*, 21 Ind. 299. Compare *Shelbyville, &c. Turnpike Co. v. Barnes*, 42 Ind.

498; *Kenosha, &c. R. R. Co. v. Marsh*, 17 Wis. 13.

The Supreme Court of Kentucky said: "The power to alter or amend a contract, in our conception, is to change it as between the original parties, and such others only as have been permitted by their mutual consent to come into the enjoyment of its benefits and privileges; not to compel one of the parties to operate in conjunction with others, and share with them the privileges and benefits of the contract." *Sage v. Dillard*, 15 B. Monr. 359. Compare *Allen v. McKeen*, 1 Sumn. 310, 311.

² *Sherman v. Smith*, 1 Black, 587; *Re Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Bailey v. Hollister*, 26 N. Y. 112; *Re Empire City Bank*, 18 N. Y. 199. Compare *supra*, § 1078.

³ *Holyoke Co. v. Lyman*, 15 Wall. 500; *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 452.

⁴ *Sinking Fund Cases*, 99 U. S. 700. See also *Close v. Glenwood Cemetery*, 107 U. S. 466.

enact a law compelling the Union Pacific and Central Pacific Railroad Companies to set aside a portion of their current earnings as a sinking fund for the purpose of meeting a very large indebtedness secured by mortgage upon the roads, and payable at a future day. The majority of the court held that the legislation was valid as an exercise of the general legislative powers of the government, and also because the right to alter or amend the charters of the companies had been expressly reserved to Congress.

Chief Justice Waite, in delivering the opinion, said: "We think the legislation complained of may be sustained, on the ground that it is a reasonable regulation of the administration of the affairs of the corporation, and promotive of the interests of the public and of the corporators. It takes nothing from the corporation or the stockholders which actually belongs to them. It oppresses no one, and inflicts no wrong. It simply gives further assurance of the continued solvency and prosperity of a corporation in which the public are so largely interested, and adds another guaranty to the permanent and lasting value of its vast amount of securities. The legislation is also warranted under the authority, by way of amendment, to change or modify the rights, privileges, and immunities granted by the charter."¹

The decision of the court in these cases was not based upon the ground that the indebtedness for the security of which the sinking fund was provided was an indebtedness to the United States, nor upon the ground that the reserved power of amendment was exercised upon the act of Congress under which the indebtedness had been created. The contract with the United States by which the indebtedness was created was as inviolable, and as little subject to alteration or amendment, as if it had been made with an individual. But the United States, by making a contract with the companies, did not abridge the general legislative control originally obtained by express reservation in their charters. The legislation creating the sinking fund was sustained in-

¹ 99 U. S. 726. Compare *Hyatt Lothrop v. Stedman*, 13 Blatchf. v. McMahon, 25 Barb. 457, 468; 136, 147.

dependently of the fact that the indebtedness to be secured was in favor of the United States. It was sustained as a reasonable provision for the proper administration of the affairs of the companies, and was considered within the reserved powers largely because the welfare of these companies was a matter of national concern.¹

§ 1101. *The Right to alter does not apply to Collateral Contracts.* — The reservation to a State of power "to repeal, alter, amend, or modify" a charter is a concession by the incorporators, whereby they voluntarily give to the State a right to vary the franchises granted to them, and their contract of incorporation.

But a reservation of this description does not purport to give the State the power to vary contracts made by a corporation in due course of its business, nor can this power be

¹ Chief Justice Waite said: "Legislative control of the administration of the affairs of a corporation may, however, very properly include regulations by which suitable provision will be secured in advance for the payment of existing debts when they fall due. If a State, under its reserved power of charter amendment, were to provide that no dividends should be paid to stockholders from current earnings until some reasonable amount had been set apart to meet maturing obligations, we think it would not be seriously contended that such legislation was unconstitutional, either because it impaired the obligation of the charter contract or deprived the corporation of its property without due process of law." pp. 721, 722. "The United States occupy towards this corporation a twofold relation, — that of sovereign and that of creditor. Their rights as sovereign are not crippled because they are creditors, and their privileges as creditors are not enlarged by the

charter because of their sovereignty. They cannot as creditors demand payment of what is due them before the time limited by the contract. Neither can they as sovereign or creditors require the company to pay the other debts it owes before they mature. But, out of regard to the rights of the subsequent lienholders and stockholders, it is not only their right, but their duty as sovereign, to see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others." pp. 724, 725. "Congress has interfered, and under its reserved power limited the privilege of declaring dividends on current earnings, so as to confine the stockholders to what is left after suitable provision has been made for the protection of creditors and stockholders against the disastrous consequences of a constantly increasing debt." p. 727.

implied by any reasonable construction of the terms used. It is "to repeal, alter, amend, or modify" *the charter*, that the right is given, and no more. "It is the charter only, and the rights and liabilities of the corporation and of its corporators as such, that can be varied by an act of the legislature; and not the private contracts made between the corporation as one party and its corporators as the other. And there can be no distinction between contracts to pay for its stock, and contracts to pay for any other purpose."¹

In the Sinking Fund Cases, Justice Strong said: "The power thus reserved is one over the act itself, not over anything that may have lawfully been done under the act before its repeal or alteration. It is only by great confusion of things essentially distinct that this power can be construed as applicable to a contract made after the corporation came into existence."²

§ 1101 *a*. A contract between the State and the corporation, if collateral to the grant of the charter, would likewise be beyond the control of the State under a reservation of the power to alter the charter. Stipulations contained in the charter itself would ordinarily be deemed merely conditions of the grant of the charter, and would therefore be subject to a reservation of the power of alteration and repeal;³ but it is not inconceivable that a charter of incorporation should contain an independent contract between the State and the corporation, which would not be affected by a reservation of legislative power over the charter alone.

§ 1102. *Contracts with Third Parties cannot be impaired.*—It may be doubted whether a State can, by any form of reservation, give itself power to vary contracts made by a corporation with third parties. The Constitution prohibits a State from passing any law impairing the obligation of contracts. A charter may be altered, where the right is reserved, because

¹ *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 571, 580, 581. *per* Justice Bradley, pp. 748, 749; *per* Justice Field, pp. 757, 758.

² 99 U. S. 700, pp. 740-742. See ³ *Spring Valley Water-Works v. Schottler*, 110 U. S. 347; also, *per* Chief Justice Waite, p. 721;

it is done with the consent of the contractors, given in the contract itself. Hence no contract is impaired. *The contract was conditional.*

But a corporation has no power to grant to the State a right over third parties. And although third parties should deal with a corporation knowing that its charter contained a provision giving the legislature control over all its contracts, that would not be a stipulation between *them* and the legislature; nor could it bind them as a mere law, because, considered as an exercise of legislative power alone, it would be unconstitutional.

Even the corporation might object. Parties cannot destroy their constitutional rights by agreement with the State.¹ Parties may sell to the State particular property, either absolutely, or merely give up a limited control over it, or they may give the State control over a particular contract by the terms of the contract itself. But an agreement to give the State arbitrary control over all future-acquired property or future contracts is different. It is a mere promise at the most, and, even if valid and binding as a promise, could certainly not be specifically enforced.

Hence, although corporators should in their charter agree to give the State control over future contracts of the corporation, that would not prevent the corporation from making an absolute contract. A refusal to permit the State to alter it might be a breach of the charter, and might subject the corporation to dissolution; but it could not be specifically enforced.²

¹ *Insurance Co. v. Morse*, 20 Wall. 445.

² Compare *supra*, § 971.

In *Miller v. State*, 15 Wall. 499, Justice Bradley delivered the following dissenting opinion (Justice Field concurring): "I dissent from the opinion of the court in this case, on the ground that the agreement with respect to the number of directors which the city of Rochester should elect was not a part of the

charter of the company, but an agreement outside of and collateral to it. Whilst the legislature may reserve the right to revoke or change its own grant of chartered rights, it cannot reserve a right to invalidate contracts between third parties; as that would enable it to reserve the right to impair the validity of all contracts, and thus evade the inhibition of the Constitution of the United States."

§ 1103. **How far Vested Rights may be affected.** — Every alteration or amendment made by the legislature in the charter of a corporation must necessarily interfere more or less with the vested rights of the shareholders in the corporate concern. So far as the power to repeal, alter, or modify a charter necessarily involves the power to interfere with the property rights of the shareholders, it must be held that the latter power is impliedly included in a grant of the former. But the right to interfere with the vested rights of the shareholders of a corporation can be implied only if it be necessarily incidental to the right of altering the franchises and charter contract; and the latter right must always be exercised in good faith for the purposes designed. "Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations are surrounded by the same sanctions, and are as inviolable, as in other cases."¹ Chief Justice Shaw said: "Where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."²

The legislature of a State is prohibited by the Constitution from depriving a corporation of its property without due process of law, and without just compensation. A reservation of the power to alter or repeal the charter of a corporation can be construed as authorizing the State to deprive the company of its property only so far as this is *necessarily* incidental to the exercise of the power expressly reserved. Any further interference with the company's property, not having been consented to by the company, would remain subject to the constitutional prohibition.³

¹ Justice Swayne, in *Shields v. Ohio*, 95 U. S. 324, 325. Compare *Greenwood v. Freight Co.*, 105 U. S. 13, 17. legislature to alter, modify, or repeal the defendant's charter did not purport to authorize the assumption of their property without compensation.

² *Commonwealth v. Essex Co.*, 13 Gray, 253. No power to do that could have existed." *Miller v. New York, &c.*

³ "The power reserved to the R. R. Co., 21 Barb. 519. See also

§ 1104. **Property cannot be confiscated.**— The right of the State to repeal the charter of a corporation, and dissolve it, by exercise of the reserved power of repeal, does not enable the State to confiscate its property. The property of the company after such repeal continues to belong to the shareholders and creditors, as in case of a dissolution by expiration of the charter, or by judicial proceedings. Justice Miller said: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights."¹

§ 1105. **Regulations for Future Government.**— Provisions intended for the future government of the affairs of a corporation are generally valid, as they may properly be called "amendments" or "alterations" of the charter; but these terms would not, as a rule, be applicable to an enactment which relates only to past transactions of the corporation.

In the Sinking Fund Cases,² Chief Justice Waite, in delivering the opinion of the court, said: "We think it safe to

Sinking Fund Cases, 99 U. S. 720, 721, 742, 758; *County of San Mateo v. Southern Pacific R. R. Co.*, 8 Sawy. 238; *Ex parte Koehler*, 23 Fed. Rep. 529; *Detroit v. Detroit, &c. Plank Road Co.*, 48 Mich. 140; *White's Creek Turnpike Co. v. Davidson County*, 3 Tenn. Ch. 396.

The State cannot foreclose a mortgage by statute. *Ashuelot R. R. Co. v. Elliot*, 58 N. H. 451. But legislation designed to effect the ends of justice is generally valid. *Close v. Glenwood Ceme-*

tery, 107 U. S. 466; and see *supra*, § 1076.

¹ *Greenwood v. Freight Co.*, 105 U. S. 18, 19; *Ashuelot R. R. Co. v. Elliot*, 58 N. H. 451, 455; and see *supra*, § 1033.

The State may transfer the property to a trustee or receiver to wind up the company's affairs, according to existing equities. *Western, &c. R. R. Co. v. Rollins*, 82 N. Car. 523.

² *Sinking Fund Cases*, 99 U. S. 700, 721.

say, that whatever rules Congress might have prescribed in the original charter *for the government of the corporation in the administration of its affairs*, it retained the power to establish by amendment. In so doing, it cannot undo what has already been done, and it cannot unmake contracts that have already been made; but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now by direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All such legislation will be confined in its operation to the future."

§ 1106. *Power of Alteration may be reserved by Constitution or by General Law.* — The right to repeal or alter the charter of a corporation may be reserved by the State through a general provision in the constitution of the State, or a general act of the legislature applicable to all corporations, as well as by the terms of the charter granted to the company. A constitutional or legislative provision of this character establishes a rule of construction governing all future grants of corporate franchises. Every charter or general incorporation law enacted thereafter must be read as containing a reservation of the right to repeal or alter it at pleasure, no express provision to this effect being required.¹

¹ "Charters subsequently granted each charter." *Holyoke Co. v. Lyman*, 15 Wall. 500, 522; *Tomlinson v. Jessup*, id. 457; *Miller v. State*, id. 478; *Railroad Co. v. Georgia*, 98 U. S. 865; *Chesapeake, &c. Ry. Co.*

The power of the legislature to repeal or alter a charter depends wholly upon its agreement with the grantees. A general act providing that charters shall be subject to the right of repeal or alteration, merely fixes the meaning to be attached to future grants. Hence, a law repealing such general act does not operate as a surrender of the power to alter charters already granted. It repeals the rule of construction applying to future grants, but does not alter the legal effect of existing charters.¹

§ 1107. **A General Reservation by the Legislature merely establishes a Rule of Construction.** — A constitutional provision that all charters thereafter granted shall be subject to the power of alteration and repeal, cannot be bargained away or repealed by the legislature. But a mere act of the legislature may, at any time, be repealed by the power which enacted it. And therefore, if the right to repeal and alter was provided by general act of the legislature, the question arises, in every case where a charter is granted by that body, whether the legislature intended to dispense with the provisions of the general act in that particular case or not.²

§ 1108. **What amounts to a Reservation of the Right to repeal or alter.** — A reservation of power to repeal, alter, or amend the charter of a corporation, is usually expressed in the most explicit terms. If the reservation was provided by the terms

v. Miller, 114 U. S. 176, 189; *Henderson v. Central, &c. Ry. Co.*, 21 Fed. Rep. 358; *Mobile, &c. Ry. Co. v. Steiner*, 61 Ala. 559; *State v. Person*, 32 N. J. Law, 134; *Massachusetts, &c. Hospital v. State Mut., &c. Ass. Co.*, 4 Gray, 227; *Suydam v. Moore*, 8 Barb. 358; *Re Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Commonwealth v. Fayette County R. R. Co.*, 55 Pa. St. 452; *Griffin v. Kentucky Ins. Co.*, 3 Bush, 592.

In *Stone v. Wisconsin*, 94 U. S. 181, a Territory had granted a charter of incorporation, and had been admitted into the Union as a State under a constitution pro-

viding that all laws for the creation of corporations "may be altered or repealed by the legislature at any time after their passage," before the charter had been accepted by the grantees. It was held that the charter was subject to the power of repeal and alteration, as provided by the constitution.

¹ *Beer Co. v. Massachusetts*, 97 U. S. 31.

² *New Jersey v. Yard*, 95 U. S. 111. Compare *Commonwealth v. Essex Co.*, 13 Gray, 239. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 684, 697.

of the charter itself, the question how far and to what cases the power of alteration extends must be determined upon a construction of the whole charter.¹

A grant of a charter of incorporation, unconditional in terms, where the right of repeal was provided by general law, raises no presumption that the legislature intended to give up the power reserved for the benefit of the public. The same rule is applicable to a grant of new rights or franchises to a corporation by whose charter the right of alteration was expressly reserved.² Such a grant would not be inconsistent with a limited general control over the management of the corporation, so far as demanded by public interests.

§ 1109. If two corporations become consolidated, and a new corporation is formed thereby, the new company will be subject to existing laws giving the legislature the power to repeal or alter the charters of all companies thereafter formed.³

A corporation whose charter is unconditional may yield to the State the power of repeal and alteration, by accepting powers or benefits under an act of the legislature containing a reservation of the power of repealing or altering the charter of any company which accepts its provisions.⁴ However, in *New Jersey v. Yard*,⁵ it was held that a general act, applying in terms to charters of incorporation granted after its passage, could not, without very strong implication, be made applicable to amendments to charters in existence before its passage, though the amendments were executed subsequently.

¹ *Hartford Bridge Co. v. Hartford*, 16 Conn. 176; *Commonwealth v. Bonsall*, 8 Whart. 560; *People v. Grand Blanc, &c. Plank Road Co.*, 10 Mich. 400; *State v. Mayor of Jersey City*, 81 N. J. Law, 575; *Pennsylvania College Cases*, 13 Wall. 221.

² See *Sinking Fund Cases*, 90 U. S. 700.

³ *Cincinnati, &c. R. R. Co. v. Cole*, 29 Ohio St. 126; *Tibballs v.*

Libby, 87 Ill. 142; *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379.

⁴ *Shields v. Ohio*, 26 Ohio St. 86; s. c. 95 U. S. 319; *State v. Maine Central R. R. Co.*, 66 Me. 488; 96 U. S. 499.

⁵ *New Jersey v. Yard*, 95 U. S. 113. *Contra*, by the Supreme Court of New Jersey in the same case, *sub nom. State v. Comm'rs of R. R. Taxation*, 87 N. J. Law, 228. Compare *supra*, § 11.

§ 1110. **What operates as a Repeal or Alteration.**—Whether or not an enactment of the legislature shall operate as a repeal or alteration of a charter, where the power to repeal or alter was reserved, is wholly a question of intention, to be ascertained as in other cases of legislative enactments. “There is no rule of law which prohibits the repeal of a special charter by a general law. Nor is there any principle of law forbidding such repeal, without the use of words descriptive of the legislative intent to repeal the earlier statute. Repeals by implication are not favored. But the question is always one of legislative intent, and the intent to abrogate the particular enactment in an earlier statute by a general provision in a later statute is sufficiently manifested where the provisions of the two enactments are so inconsistent that they cannot stand together.”¹

It is plain that the repeal of a general incorporation act, and the re-enactment of a new one, does not affect existing corporations formed under the old act; for the object of such legislation is clearly to provide laws for the government of future corporations only.²

§ 1111. **An Alteration may be offered to the Majority.**—If an alteration of the charter of a corporation is of such a character that the State would have constitutional authority to impose it compulsorily, by virtue of its general power of legislation, there seems to be no reason why such alteration should not be sustained, if enacted in the shape of a permission or offer to the majority of the corporators. An alteration thus enacted would in effect be compulsory, upon receiving the assent of a certain portion of the shareholders; and it would not impair the company's charter more nor less than if it had been imposed without the consent of any member.

So, also, if a State has the right to repeal or alter a charter

¹ *State v. Comm'rs of R. R. Taxation*, 37 N. J. Law, 230; *Bangor, &c. R. R. Co. v. Smith*, 47 Me. 34; *Union Improvement Co. v. Commonwealth*, 69 Pa. St. 140; *Mechanics', &c. Bank v. Bridges*, 80 N. J. Law, 112; *Webb v. Ridgely*, 38 Md. 364. Compare *Clarkson v. Hudson River R. R. Co.*, 12 N. Y. 304. ² *Freehold Mut. Loan Ass. v. Brown*, 29 N. J. Eq. 122; *United Hebrew Ben. Ass. v. Benshimol*, 180 Mass. 825. Compare *Wilson v. Tesson*, 12 Ind. 285.

by virtue of the terms of the charter itself, this right may be exercised in any manner the State may see fit. An alteration may be made by an act of the legislature unconditional in its operation, or it may be made to depend upon the will of the majority or any other portion of the corporators whether the alteration shall go into effect or not.¹

§ 1112. *The Extent of the Right.* — When unconditional. — The power of the legislature to repeal, alter, or amend a charter, under a reservation of this character, is not exhausted after having been once exercised, but continues in force until relinquished by a repealing act.²

If the power of repeal, alteration, or amendment was reserved unconditionally, the legislature may either repeal, alter, or amend the charter arbitrarily, without the consent of the corporators, and without resorting to judicial process.³

Sometimes the right is reserved to repeal a charter, "if the corporation shall at any time misuse or abuse its franchises." The authorities are in conflict as to the legal effect of a reservation of this character. In Pennsylvania it was held that the authority of the legislature to repeal a charter was absolute, if the misuse or abuse had actually occurred; but that the constitutionality of the act of repeal depended upon the existence of the fact of misuse or abuse, and might be inquired into collaterally.⁴ But in a careful judgment deliv-

¹ *Supra*, § 405.

² *State v. Comm'rs of R. R. Taxation*, 37 N. J. Law, 228; *Proprietors of Side Booms v. Haskell*, 7 Me. 474.

³ *Lothrop v. Stedman*, 13 Blatchf. 134; s. c. 42 Conn. 500; *Mayor of Baltimore v. Pittsburgh, &c. R. R. Co.*, 1 Abb. (U. S.) 9; *McLaren v. Pennington*, 1 Paige, 107; *Comm'rs of Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 146; *Mayor of Worcester v. Norwich, &c. R. R. Co.*, 109 Mass. 118; *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32; *Greenwood v. Freight Co.*, 105 U. S. 13, 17; *Zabriskie v. Hacken-*

sack, &c. R. R. Co., 18 N. J. Eq. 192; *Griffin v. Kentucky Ins. Co.*, 3 Bush, 592; *Wilson v. Tesson*, 12 Ind. 285; *Erie, &c. R. R. Co. v. Casey*, 26 Pa. St. 287; *Sinking Fund Cases*, 99 U. S. 700.

A reservation of the power to repeal a charter does not take away the right of procuring a dissolution by judicial proceedings for a forfeiture. *Eastern Archipelago Co. v. Regina*, 2 El. & Bl. 856; *Grand Gulf R. R., &c. Co. v. Mississippi*, 10 Sm. & M. 428.

⁴ *Erie, &c. R. R. Co. v. Casey*, 26 Pa. St. 287; s. c. 1 Grant's Cas. 274; *Commonwealth v. Pittsburg, &c.*

ered by the Supreme Court of Michigan it was held that the power of the legislature to repeal a charter, if "it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act," could not be exercised until the violation of the act had been determined by some sort of judicial proceeding.¹

There are certainly strong arguments of convenience in favor of this latter view. By obtaining a judicial determination of the facts upon which the right to repeal was made to depend, the constitutionality of the act of repeal would be settled once for all. But if the constitutionality of the act of repeal depended upon the fact of a violation of the charter, this fact might be denied in collateral actions; and the validity of the repeal would in each case depend upon the findings of a jury. Great uncertainty might thus arise.²

However, there are also arguments in favor of the view adopted by the Supreme Court of Pennsylvania. Black, J., said: "The plaintiff's counsel insist that, inasmuch as the right to repeal depended on matter of fact, the right could not be exercised until the fact was ascertained by a judicial trial. But if this were not a mistake, the reservation would be nugatory. When the abuse of a charter is judicially ascertained, the corporation will be dissolved without the intervention of the legislature, and the court could not decide the fact to be true without pronouncing the judgment of forfeiture. The legislature certainly meant to reserve something more than the right to dissolve the corporation after it shall be dissolved by a court. The power to kill what is already dead is no power at all."³

R. R. Co., 58 Pa. St. 46. Compare *Woodhull*, 25 Mich. 110, 111, *per* *Crease v. Babcock*, 23 Pick. 334; *Cooley, J.*
Miners' Bank v. United States, 1
Morr. (Iowa) 482.

¹ *Flint, &c. Plank Road Co. v. Woodhull*, 25 Mich. 99. Compare *Delaware R. R. Co. v. Tharp*, 5 Harr. (Del.) 454; *Mayor of Baltimore v. Pittsburgh, &c. R. R. Co.*, 1 Abb. (U. S.) 9.

² *Flint, &c. Plank Road Co. v.* *Erie, &c. R. R. Co. v. Casey*, 26 Pa. St. 302. There seems to be no reason why the legislature should not be constituted the tribunal to determine whether or not a corporation has violated its charter; but in this case the parties whose rights are affected by the determination would be entitled to a hearing.

§ 1113. It has been intimated by various judges, that, although a State may *repeal* a charter without the consent of the grantees, if the power to repeal was reserved, yet that an *alteration* made under a power to alter, reserved in similar terms, must be accepted by the corporation, or at least a majority of its shareholders.¹

It seems a forced construction to hold that a naked reservation of power to repeal or alter, means a power to repeal at pleasure, and to alter only provided a majority of shareholders, or the corporation itself, choose to accept the alteration. The power of altering a charter with the consent of the grantees always existed, and the object of expressly reserving the right was to obviate the necessity of obtaining this consent.

However, a State *may*, in the exercise of an unconditional right to alter, make an alteration contingent upon its ratification by the shareholders, or even a majority of their number.² And it is possible that, by virtue of a reserved power of *repealing* a charter, the State may compel the corporators to elect, at their option, either to accept a change which the State could not make without their consent, or to go out of existence as a corporation altogether, by repeal of their charter.³

¹ *Yeaton v. Bank of Old Dominion*, 21 Gratt. 598.

² Compare *Yeaton v. Bank of Old Dominion*, 21 Gratt. 599.

³ *Supra*, § 1111.

CHAPTER XVI.

DUTIES OF CORPORATIONS WHICH HAVE RECEIVED
STATE AID.

§ 1114. Corporations formed to accomplish Public Purposes.

— The legislature of a State has authority to use the powers and funds of the State in order to secure the construction and maintenance of public highways, railroads, canals, bridges, telegraph lines, water and gas works, and other works of immediate and general public utility. These are matters within the scope of the functions which have by general consent been attributed to the government. In the United States it is not customary to establish railroads and similar enterprises directly under the supervision and control of the government, but the desired public benefits are secured by granting the aid of the State to private corporations which have been formed for the purpose of establishing and maintaining works of this character as business enterprises. It has long been the policy of the various States to encourage the formation of private companies for the construction and maintenance of highways, railroads, canals, bridges, telegraph lines, water-works, gas-works, &c., by granting valuable franchises and public bounties in their aid.

The legislature of a State has, however, no constitutional authority to grant a public bounty except for the purpose of accomplishing some public good.¹ It cannot dispose of the rights or funds of the people to assist a purely private enterprise. A grant of State aid to enable a private corporation to accomplish a purpose of public interest is, therefore, always subject to the implied condition that the company shall

¹ *Loan Association v. Topeka*, 20 Wall. 655.

assume an obligation to the State to fulfil the purposes of the grant.

The legislature would have no power to grant the aid of the State on any other terms. It is immaterial whether the aid be in the form of a direct donation of funds or property by the State, or by a county or municipality, or in the form of a subscription for shares, or of a delegation of the power of eminent domain, or of an exemption from taxation, or of a monopoly. In each instance, the acceptance of the grant of the public aid implies an assumption by the grantee of an obligation in favor of the public.¹

§ 1115. **Public Duties of Railroad Companies.**—The national importance of railroads and other public highways is obvious. They are essential to the prosperity of the country in its present state. Hence it is that the representatives of the people are authorized to grant valuable donations and franchises, such as land grants, the right to exercise the power of eminent domain, the right to receive municipal aid, &c., to railroad companies, in order to enable them to accomplish their great enterprises.² The grant of these public bounties to a railroad company is, however, in all cases, subject to the implied condition that the grantee shall assume an obligation to maintain its railroad as a thoroughfare for the use of the public.

§ 1116. **Railroad Companies must operate their Railroads.**—It has been held, accordingly, that a railroad company which

¹ See *per* Chancellor Zabriskie, in *Rogers Locomotive, &c. Works v. Erie Ry. Co.*, 20 N. J. Eq. 385; *Kenton County Court v. Bank Lick Turnpike Co.*, 10 Bush (Ky.), 529; *Messenger v. Pennsylvania R. R. Co.*, 86 N. J. Law, 413, *per* Beasley, C. J.; *Inhabitants of Worcester v. Western R. R. Co.*, 4 Metc. (Mass.) 566, *per* Shaw, C. J.; *Chicago, &c. Ry. Co. v. People*, 56 Ill. 379, *per* Lawrence, C. J. Compare *Tucker v. Ferguson*, 22 Wall. 527. See also the cases cited in the following sections.

² In *Buncombe County Comm'rs*

v. Tommey, 115 U. S. 122, 123, Harlan, J., said: "Municipal taxation to aid in their construction has been maintained only upon the ground that they are, in a large sense, instrumentalities or agencies for the purpose of accomplishing public ends. Upon that ground rests the authority of the State to invest them with the right of eminent domain in the condemnation of private property, and to prescribe from time to time, in the interest of the public, reasonable regulations for their control and management."

has accepted State aid is under an obligation to the State to operate every material portion of its line for the use of the public, until discharged from this obligation by the government. This was decided by the Supreme Court of Connecticut in *State v. Hartford and New Haven Railroad Co.*¹ A corporation which had been chartered to operate a railroad from Hartford to the navigable waters of New Haven harbor, and which had operated its road in connection with a line of steamships, afterwards, by arrangement with another railroad company, refused to run passenger trains to the landing of the steamships. A writ of mandamus having been issued to compel the company to continue the running of trains as before, Ellsworth, J., in delivering the opinion of the court, said: "We hardly know what doubtful principles of law are thought to be involved in the case. The respondents certainly were bound to make their road (if at all) within the time prescribed by their charter, and, having made it, to put it into use, — every material part of it, — and keep it in use until discharged by the legislature."

So it was held in New York, that it is the duty of a railroad company to receive and transport such freight as is offered it for transportation in regular course of business, and that it cannot excuse its failure to perform this duty on the ground that its skilled laborers have joined a strike for higher wages, and have refused to act. Davis, C. J., in delivering the opinion of the Supreme Court, said: "We cannot bring our minds to entertain a doubt that a railroad company is compellable by mandamus to exercise its duties as a carrier of freight and passengers; and that the power so to compel it rests equally firmly on the ground that that duty is a public trust, which, having been conferred by the State, and accepted by the corporation, may be enforced for the public benefit; and also upon the contract between the corporation and the State, expressed in its charter or implied by the acceptance of the franchise; and also upon the ground that the common right of all the people to travel and carry upon every public highway of the State has been changed

¹ 29 Conn. 538, 547.

in the special instance by the legislature, for adequate reasons, to a corporate franchise, to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, whereby it has become the duty of the State to see to it that the franchise so put in trust be faithfully administered by the trustee."¹

§ 1117. *Duties of Railroad Companies as Common Carriers.*—The duties to the public which devolve upon railroad companies by reason of their acceptance of the aid of the government, reinforce and supplement the duties which are imposed upon them by the common law as common carriers for hire. A railroad company is under an obligation to the State to maintain its road in operation, because the road was constructed with the public aid for a public purpose. The usual duties of a common carrier then attach, by virtue of the employment in which the company is engaged. By the common law, "every common carrier must carry for all, to the extent of his capacity, without undue or unreasonable discrimination in charges or facilities."² Moreover, the carrier cannot exact more than reasonable compensation for his services.³

These duties devolve upon railroad companies, both by reason of their employment as common carriers, and by reason of their acceptance of the public aid in the creation of their enterprises. The obligation of railroad companies to maintain their roads in operation for the use of the public necessarily implies an obligation not to exact more than reasonable charges or tolls; for otherwise the public might be deprived of the benefits in consideration of which the public aid was granted. It is equally clear that the obligation to carry for the public includes an obligation to carry for all the members of the community without partiality.⁴

¹ *People v. New York Central, &c. R. R. Co.*, 28 Hun, 548, 558. See also *infra*, §§ 1132-1135.

² *Atchison, &c. R. R. Co. v. Denver, &c. R. R. Co.*, 110 U. S. 667, 674, *per* Chief Justice Waite.

³ See 16 Am. L. Rev. 446.

⁴ In *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. Law, 407, Chief Justice Beasley said: "In my opinion, a railroad company constituted under statutory authority is not only by force of its inherent nature a common carrier, as was held in the

The duty of railroad companies to furnish the public with the facilities of railroad transportation at a reasonable charge, and without unjust discrimination, has in many instances been embodied in statutory provisions declaratory of the common law. Laws of this character have been enacted in England and in many of the States.¹ It is, however, often an extremely complex and difficult problem to determine what constitutes an undue or unreasonable discrimination in charges or facilities, by a railroad company, and what is a reasonable compensation for the services rendered.²

case of *Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 749, but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. . . . In the use of such franchises all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants, that they are to be held as a quasi public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents; and the consequence is, they must, in the exercise of their calling, observe to all men a perfect impartiality." See also *Chicago, &c. Ry. Co. v. People*, 56 Ill. 379, *per*

Chief Justice Lawrence; *McDuffee v. Portland, &c. R. R. Co.*, 52 N. H. 430, 454, 455; *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 196, 197; *Sandford v. Railroad Co.*, 24 Pa. St. 381; *Chicago, &c. R. R. Co. v. People*, 67 Ill. 11; *Beekman v. Saratoga, &c. R. R. Co.*, 3 Paige, 75, *per* Chancellor Walworth. Compare *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Commonwealth v. Delaware, &c. Canal Co.*, 43 Pa. St. 295; *Shipper v. Pennsylvania R. R. Co.*, 47 Pa. St. 340; *Eclipse Towboat Co. v. Pontchartrain R. R. Co.*, 24 La. Ann. 14; *Sargent v. Boston, &c. R. R. Co.*, 115 Mass. 416.

¹ See *McDuffee v. Portland, &c. R. R. Co.*, 52 N. H. 430, 456; *Atchison, &c. R. R. Co. v. Denver, &c. R. R. Co.*, 110 U. S. 667. The English statutes are collected in *Brown and Theobald's Railways*.

² For a discussion of this question, see an essay entitled "Extortionate Traffic Rates," 16 Am. L. Rev. 446, and an essay entitled "Discriminative Traffic Rates," *Id.* 818.

A valuable collection of the English cases may be found in *Brown and Theobald's Railways*. As to the remedies for the enforcement of these duties, see *infra*, §§ 1132-1135.

§ 1118. *Obligations of Railroad Companies to other Carriers.*
— It has been decided by the Supreme Court of the United States, that a railroad company is not under an obligation to stop at the junction of its railroad with that of another company, and interchange business with the latter,¹ or to haul the cars of a sleeping-car company,² or to extend to express companies the peculiar facilities necessary to enable them to carry express matter in the usual manner.³

Railroad companies are clearly not bound, by the common law, to perform services of this character merely because they are common carriers for hire. Whether they can be charged with a duty to perform such services by reason of the public aid given them in their enterprises, would depend upon the question whether the performance of such services can fairly be deemed a part of the public purposes in consideration of which the public aid was given. The Supreme Court held that, while railroad companies might be under an obligation to furnish the public with the advantages of the express business, of conveyance by sleeping cars, and of transportation to points beyond the limits of their lines, this did not include an obligation to furnish express companies, sleeping-car companies, and other railroad companies with the peculiar facilities necessary to enable them to perform *their* business; and that the public had no interest in the particular agencies selected by railroad companies in performing their public duties.

Chief Justice Waite said: "At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that, if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. A railroad com-

¹ Atchison, &c. R. R. Co. v. Denver, &c. R. R. Co., 110 U. S. 667. 802; Same v. St. Louis, &c. Ry. Co., 10 Fed. Rep. 210, 869; Wells

² Pullman Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587. v. Oregon Ry., &c. Co., 15 Fed. Rep. 561; Wells, Fargo, & Co. v.

³ Memphis, &c. Express Co. v. Southern Express Co., 117 U. S. 1, Northern Pacific Ry. Co., 28 Fed. Rep. 469. Compare Sargent v. overruling Southern Express Co. v. Boston, &c. R. R. Co., 115 Mass. Memphis, &c. Ry. Co., 8 Fed. Rep. 416.

pany is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road ; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations with another company at another place.”¹

“So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodation. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.”²

§ 1119. **What is a sufficient Excuse for failing to operate a Railroad.** — A railroad company is not under an unconditional obligation to supply the public with facilities for transportation. The company must make an honest endeavor to satisfy the wants of the public, and must use all means in its control to do so ; but having done all in its power, it cannot be charged with the failure of its endeavors. Thus, the fact that the skilled laborers of a railroad company have joined in a strike for higher wages, and have refused to work, would not of itself be a justification for a refusal of the company to transport freight, as the company might hire other laborers ;³

¹ Atchison, &c. R. R. Co. v. Denver, &c. R. R. Co., 110 U. S. 667, 680, 682. Compare Stetler v. Chicago, &c. Ry. Co., 49 Wis. 609.

² Memphis, &c. Express Co. v. Southern Express Co., 117 U. S. 1.

³ In *People v. New York, &c. R. R. Co.*, 28 Hun, 543, 558, Davis, C. J., said: “Can railroad corporations refuse to perform their public duties upon a controversy with their employees over the cost or expense

of doing them? We think this question admits of but one answer. The excuse has no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down, or abandoned, or suspended, without the legally expressed consent of the State. The trusts are active, potential, and imperative, and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or ob-

but if it were shown that the company was prevented from hiring laborers by riots or intimidation, or that it was impracticable to hire laborers except at exorbitant charges, this would be a sufficient excuse.

The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in operation; and in such case the company may cease operating the road,¹ unless this be contrary to the express terms of its charter.²

§ 1120. **A Railroad Company cannot sell, lease, or mortgage its Railroad in the Absence of express Authority.** — It is plain that a corporation which has received a grant of State aid to enable it to accomplish a public purpose has no implied authority by its charter to do any act which would defeat this purpose. Any transaction which would disable the corporation from performing its obligations to the State would be prohibited by law, and illegal, because it would involve both an unauthorized exercise of corporate power and the violation of a public trust.

In *Thomas v. West Jersey Railroad Company*, Justice Miller, delivering the opinion of the Supreme Court of the United States, said: "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."³

structed without any process recognized by law."

¹ *Commonwealth v. Fitchburg B. R. Co.*, 12 Gray, 180.

² *State v. Sioux City, &c. R. R. Co.*, 7 Neb. 357, 374.

³ *Thomas v. West Jersey R. R. Co.*, 101 U. S. 71, 83.

It has been decided, therefore, that a railroad company cannot make a valid sale or lease of its railroad, or of any property essential to the operation of its railroad, in the absence of express authority from the State.¹ So it has been held that a railroad company cannot make a valid mortgage of its property without the consent of the State; for, by foreclosure of the mortgage, the corporation would become disabled from performing its duties to the public.²

A railroad company cannot sell, or lease, or mortgage its road to another company, even though the latter undertake to keep the road open at all times for the use of the public; for a corporation has no implied authority to delegate the performance of its public duties to another company.³

The same rule undoubtedly applies to any other company which has been empowered by the State to establish its works through exercise of the right of eminent domain, or which has received State aid in its enterprise in any other form.⁴

§ 1121. Property not necessary to enable a Company to perform its Duties to the Public may be disposed of. — A corpora-

¹ *Thomas v. West Jersey R. R. Co.*, *supra*. See also *York, &c. R. R. Co. v. Winans*, 17 How. 30, 39; *per* Chancellor Zabriskie in *Black v. Delaware, &c. Canal Co.*, 22 N. J. Eq. 399; *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393; *Middlesex R. R. Co. v. Boston, &c. R. R. Co.*, 115 Mass. 347; *Tippecanoe County v. Lafayette, &c. R. R. Co.*, 50 Ind. 85, and cases cited; *Pierce v. Emery*, 32 N. H. 484, 504, 507; *State v. Consolidation Coal Co.*, 46 Md. 1; *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464.

It should be observed, that a sale or lease of the entire property of a corporation would ordinarily be unauthorized irrespective of any duty which the company may owe the public. It would be a departure from the company's chartered purposes. See *supra*, §§ 413-416.

² *Hall v. Sullivan Ry. Co.* (U. S. Cir. Ct. Dist. N. H.), 2 Redf. Ry. Cas. 621; 21 Law Rep. 138; *Commonwealth v. Smith*, 10 Allen, 448; *Richardson v. Sibley*, 11 Allen, 65. Compare *Savannah, &c. R. R. Co. v. Lancaster*, 62 Ala. 555.

³ *Beman v. Rufford*, 1 Sim. N. S. 569; *York, &c. R. R. Co. v. Winans*, *supra*; *Thomas v. West Jersey R. R. Co.*, *supra*; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. Ch. 837. Compare *Rogers Locomotive, &c. Works v. Erie Ry. Co.*, 20 N. J. Eq. 379, 386; *Clark v. City of Washington*, 12 Wheat. 40, 54; *Roper v. McWhorter*, 77 Va. 214.

⁴ See *Roper v. McWhorter*, 77 Va. 214; *Kenton County Court v. Bank Lick Turnpike Co.*, 10 Bush (Ky.), 529; *Gue v. Tide Water Canal Co.*, 24 How. 257; *Louisville Water Co. v. Hamilton*, 81 Ky. 517.

tion has implied authority to sell, lease, or mortgage any property owned by it which is not necessary to enable it to perform its duties to the public. Thus, a railroad company may sell, lease, or mortgage real or personal property which is not necessary to the use and operation of its railroad, although it could not dispose of the railroad itself.¹ In *Platt v. Union Pacific Railroad Co.*, Justice Strong said: "Railroad companies are not usually empowered to hold lands other than those needed for roadway and stations, or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership,—the right to sell or mortgage."²

§ 1122. *Sales, Leases, and Mortgages executed by Railroad Companies pursuant to express Authority.*—A railroad company which has received State aid in the construction of its railroad may undoubtedly sell, lease, or mortgage its entire property, if expressly authorized to do so by act of the legislature. In such case it is implied that the purchaser or lessee of the property shall enjoy such franchises as are necessary to the use of the property as a railroad, and shall assume the same obligations to the State in respect to the use of the property as rested upon the company which first acquired it.³

Railroad companies ordinarily do not own the land in fee, on which their roads are built, but have merely an ease-

¹ *Hendee v. Pinkerton*, 14 Allen, 381. Compare *Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. St. 465. See *infra*, § 1125.

² *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, 58.

A railroad company cannot grant an easement of a footway for persons to walk along its roadway, nor can such an easement be acquired by prescription, or a dedication on the part of the company; for the railroad company itself has only an easement or right of way for its own

use. *Sapp v. Northern Central Ry. Co.*, 51 Md. 115; *Heyl v. Philadelphia, &c. R. R. Co.*, 51 Pa. St. 469; *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 500.

³ See *Chicago, &c. Ry. Co. v. Crane*, 118 U. S. 424.

A railroad company formed by the consolidation of several companies takes the property of the original companies subject to the obligations which these companies owed to the State. *Supra*, § 950.

ment or right of way for railroad purposes. A sale or lease of the property of a railroad company would therefore usually give the purchaser or lessee only a right to continue the use of the property for railroad purposes; he would acquire no greater interest than belonged to the vendor or lessor. Moreover, the rights of the public in the use of the property must be preserved unimpaired. A grant by the legislature of authority to a railroad company to sell or lease its railroad, does not authorize the company to sell or lease the property in parts, so as to render its further use as a railroad impracticable. It is implied that the company shall be authorized to sell or lease only its interest in the property, and that the right of the public to have the use of the railroad, subject to reasonable tolls, shall not be infringed. So, where the property of a railroad company is mortgaged, with the consent of the legislature, it is always an implied condition that the property shall, in case of a foreclosure, be sold in such a manner as not to impair its usefulness as a railroad, and that the purchaser shall take the property subject to the right of the State to have the road kept in operation as a public highway.¹ Upon this ground, it follows also that, when a mortgage upon a railroad running through several States is foreclosed, the proper course is to direct a sale of the property as an entirety.²

§ 1123. **What operates as a Grant of Authority to sell, lease, or mortgage a Railroad.** — In *Branch v. Jesup*, the Supreme Court of the United States held that a grant of authority to a railroad company to purchase and sell property of every kind, nature, or quality, and to sell or dispose of the same, and likewise to incorporate its stock with that of any other

¹ See *Chicago, &c. Ry. Co. v. Loewenthal*, 93 Ill. 433.

In *Peoria, &c. R. R. Co. v. Thompson*, 108 Ill. 187, it was held that, where a railroad, its appurtenances, rolling stock, and franchises, are mortgaged as a whole, they cannot be sold separately; and such property, as a whole, not being strictly

speaking "lands or tenements," there is no right of redemption under a statute giving the mortgagor of "lands and tenements" a right to redeem within twelve months after a foreclosure sale.

² *Muller v. Dows*, 94 U. S. 444, 449; *Randolph v. Wilmington, &c. R. R. Co.*, 11 Phila. 502.

company, by implication included authority to sell the railroad to any company competent to purchase it. Justice Bradley said:—

“As a rule, it is true, a railroad company, with only the ordinary power to construct and operate its road, cannot dispose of it to another company. Legislative aid is necessary to that end. But this company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company, and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands not needed for railroad use may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so, not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of those purposes; and it would be dereliction of the duty owed by the corporation to the State and to the public to part with them. But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company. In this country the creation and exercise of such a power is very well understood. It contemplates not only the possible transfer of the railroad and franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation extends to a class of subjects to which it does not ordinarily apply.”¹

¹ Branch v. Jesup, 106 U. S. 468, &c. R. R. Co., 3 Woods, 461; Hovel-478. See also Branch v. Atlantic, man v. Kansas City Horse R. R. Co.,

§ 1124. **The Rule in New York.**—In *Woodruff v. Erie Railway Company*, the Court of Appeals of New York said:—

“Whatever may be the rule in other States, or in England, the public policy of this State, as manifested by numerous acts of the legislature, has always been, not only to afford the fullest scope for the consolidation and reorganization of non-competing railroads and railroad corporations, but also for the transfer of the use of such roads and their franchises by one corporation to another.

“The first statute passed on this subject was chapter 118 of the Laws of 1839, and is a general law, consisting of a single section, providing as follows: ‘It shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contracts,’ but not in a manner inconsistent with the provisions of the charter of the company whose road was to be used under such contract. This act was never repealed, and has been held by this court to confer power upon railroad corporations, not only to acquire, but also to transfer to other railroad corporations, by lease, the exclusive right to use and enjoy the property and privileges of the lessor in such contract. Since this act, various statutes have been enacted in this State recognizing the validity of such leases, and imposing duties and obligations, as well as conferring powers upon the lessees of railroads, with a view of enlarging the benefits and privileges enjoyed by them under such transfers.”¹

79 Mo. 632; *Phillips v. Winslow*, 18 B. Monr. 431, 445.

An unauthorized lease or mortgage may be rendered valid by the subsequent assent of the legislature. *Boston, &c. R. R. Co. v. New York, &c. R. R. Co.*, 18 R. I. 260.

¹ *Woodruff v. Erie Ry. Co.*, 93 N. Y., 609, 615, 616, *per* Ruger, Ch. J. See also *Fisher v. Metropolitan Elevated Ry. Co.*, 84 Hun, 433; *Fisher v. New York, &c. R. R. Co.*,

46 N. Y. 644; *People v. Albany, &c. R. R. Co.*, 77 Id. 282; *Troy, &c. R. R. Co. v. Boston, &c. Ry. Co.*, 86 Id. 107.

The fact that a railroad corporation has leased its road to another corporation for the full period of its corporate life does not deprive it of the right to acquire land for its corporate uses by proceedings *in invitum*; nor is it material in this respect that the lessee is a foreign

§ 1125. Property necessary to enable a Corporation to perform its Duties to the Public cannot be taken under an Execution.—If a corporation has received aid from the government for a public purpose, any property of the company which is necessary to enable it to accomplish this purpose is impressed with a trust in favor of the public, and cannot be seized or sold by creditors of the company under an execution.¹ Property which has been acquired by the company by purchase, if not necessary to enable the company to perform its duties to the public, may be taken under an attachment or execution;² but after exhausting this class of property, the only remedy of a judgment creditor is to obtain the appointment of a receiver, and a sequestration of the company's earnings.³

§ 1126. Whether a Railroad Company is under an Obligation to construct its Road.—It has been shown in the preceding sections, that a corporation which has constructed a railroad by exercise of the extraordinary powers conferred by the State becomes subject to an implied obligation to maintain the road in operation until discharged by law, or until the public want for the road has ceased.

The question whether a railroad company is under a duty to the State to *construct* the line or road which it was chartered to build, depends upon somewhat different considerations. The duty of a company to *operate* a railroad built with the aid of the State is in the nature of a trust obligation, arising from the fact that the public bounty accepted by the company was granted for the accomplishment of a

corporation. *Re New York, &c. Ry. Co.*, 99 N. Y. 12, affirming 35 Hun, 220, 227.

¹ *Gue v. Tide Water Canal Co.*, 24 How. 257; *Foster v. Fowler*, 60 Pa. St. 27; *Gooch v. McGee*, 83 N. Car. 59; *Baxter v. Nashville, &c. Turnpike Co.*, 10 Lea (Tenn.), 488; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Palestine v. Barnes*, 50 Tex. 538. Compare *Youngman v. Elmira, &c. R. R. Co.*, 65 Pa. St. 278.

The property of a storage and warehouse company may be taken under an execution or attachment.

Girard Point Storage Co. v. Southwark Foundry Co., 105 Pa. St. 251. Compare *supra*, § 1074.

² *Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 337; *American Dock, &c. Co. v. Trustees*, 39 N. J. Eq. 410. Compare *supra*, § 1121.

³ *Foster v. Fowler*, 60 Pa. St. 27; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112.

public purpose only. But, in order to hold a railroad company liable to the State to *construct* the railroad, it would be necessary to place this obligation on the ground of a contract entered into by the acceptance of the charter; and it would be difficult to imply such an agreement where a charter does not in terms impose an obligation, but purports to be permissive only.

§ 1127. This question has been very fully considered by the English courts; and, after much difference of opinion among the judges, it was finally settled that a charter purporting to authorize a company to build a railroad does not make it obligatory upon the company to build the road, either from the time of the acceptance of the charter or after a portion of the road has been built.

In *Regina v. Lancashire, &c. Railway Company*,¹ the Court of Queen's Bench decided that a railway company which had constructed a portion of its line of road might be compelled to complete it by writ of mandamus. Lord Campbell, C. J., said:—

“After long and anxious deliberation, I have come to the conclusion that we are bound in this case to pronounce judgment for the prosecutors.

“Where the directors of a railway company have actually availed themselves of the extraordinary powers conferred upon them, at their own solicitation and on their own representations, by getting possession of lands without the consent of the owners, and beginning the formation of a railway, which necessarily interferes with public as well as private rights, I have never been able to bring myself to doubt that there is a duty incumbent upon them to complete the undertaking, and that we are empowered to compel the performance of this duty by mandamus.

“Whether, where the company have done nothing as between themselves and third parties or the public, under their Parliamentary powers, they may not wholly abandon the undertaking, is a very different question. I was at first inclined to think that, till they have actually interfered with private

¹ 1 El. & Bl. 242.

or public rights after the passing of their act of Parliament, they are not to be considered as having entered into any contract or incurred any obligation to execute the undertaking. Neither individuals nor the public necessarily suffer any severe injury by the scheme having been formed and repudiated; and neither the consideration nor the promise, which constitute the contract or obligation, can be said to be so apparent, if the shareholders agree to dissolve the company as soon as the act of Parliament has passed. But my present opinion is, that at the moment when the act receives the royal assent the contract and obligation attach, and that by the legislature alone can the contract or obligation be discharged.”¹

The judgment of the Court of Queen’s Bench was, however, reversed, by the unanimous decision of the Exchequer Chamber. Jervis, C. J., delivering the unanimous judgment, used the following language: “It is said that a railway act is a contract on the part of a company to make the line, and that the public are a party to that contract, and will be aggrieved if the contract may be repudiated by the company at any time before it is acted upon. Though commonly so spoken of, railway acts, in our opinion, are not contracts, and ought not to be construed as such. They are what they profess to be, and no more; they give conditional powers which, if acted upon, carry with them duties, but which, if not acted upon, are not, either in their nature or by express words, imperative upon the companies to whom they were granted. Courts of justice ought not to depart from the plain meaning of words used in acts of Parliament; when they do so, they make, but do not construe, the laws; and if it had been so intended, the statute should have required the company to make the line in express terms: indeed, some railway acts are framed upon that principle, and to say that there is no

¹ *Regina v. Lancashire, &c. Ry. Co.*, 1 El. & Bl. 242; *Regina v. York Ry. Co.*, Id. 178; *Regina v. Great Western, &c. Ry. Co.*, Id. 253. The preceding cases were reversed by the Exchequer Chamber. Compare *Regina v. Eastern Counties Ry. Co.*, 10 Ad. & El. 581, *per* Lord Denman; *Anstruther v. East of Fife Ry. Co.*, 19 L. T. Rep. 180; *Blake-more v. Glamorganshire Canal Nav. Co.*, 1 M. & K. 162, *per* Lord Eldon.

difference between words of requirement and words of authority, when found in such acts, is simply to affirm that the legislature does not know the meaning of the commonest expressions."¹

§ 1128. **Whether a Railroad Company is under an Obligation to complete its Railroad.** — Reason, as well as the weight of authority, indicates that a railroad company does not become liable to the State to construct the railroad contemplated at its incorporation by the mere acceptance of a charter purporting to be permissive only. But after a corporation has accepted and enjoyed the benefit of a grant of State aid for the purpose of constructing a particular railroad, it would undoubtedly incur an obligation to construct the railroad according to the terms of the grant.

A corporation chartered to construct a particular line of road certainly has no authority to construct and operate merely a portion of the road, if that would amount to a departure from the company's chartered purposes;² nor can the aid granted by the public be used for any purpose except the construction of the railroad in consideration of which the grant was made. It would seem to follow, therefore, that, after a railroad company has constructed a portion of the railroad indicated by its charter, by the aid of public donations or the exercise of the power of eminent domain, it would incur an obligation to the State to complete the work. The aid of the government was not granted, and could not be granted, for the construction of an unfinished railroad.³

¹ *York, &c. Ry. Co. v. Regina*, 1 El. & Bl. 858, 864. This decision was followed by the House of Lords in *Edinburgh, &c. Ry. Co. v. Philip*, 2 Macq. App. Cas. 526; *Scottish, &c. Ry. Co. v. Stewart*, 3 Macq. App. Cas. 414. See also *State v. Southern Minnesota R. R. Co.*, 18 Minn. 40; *Weymouth v. Penobscot Log Driving Co.*, 71 Me. 29, 38.

In *York, &c. Ry. Co. v. Regina*, *supra*, *Jarvis, C. J.*, said: "We desire not to be understood as assent-

ing to the proposition of my brother Erle, that 'many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus.' And, on the other hand, we do not say that such may not be the law." p. 870.

² *Supra*, § 419.

³ As to the remedy if a railroad company violates its duty to the public by failing to construct its railroad, see *infra*, § 1136. It has

§ 1129. *Telegraph, Water, and Gas Companies.* — The doctrine discussed in the preceding sections applies to other corporations than railroad companies. It may be laid down as a general rule, that, whenever the aid of the government is granted to a private company in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfil the public purpose on account of which the grant was made.

Thus a telegraph company may be invested by the legislature with the right of taking private property by exercise of the power of eminent domain.¹ By exercising this power, the company would incur an obligation to give the public the benefit of telegraphic communication over its lines, at reasonable charges;² and any act of the company which would disable it from performing its duties to the public would be prohibited by law.³

The same rule applies to companies invested with special privileges at the expense of the public, for the purpose of supplying cities with water. Thus, in *Lumbard v. Stearns*,⁴ it was argued that an act of the legislature, incorporating certain persons as an aqueduct company for the purpose of

been held that an agreement made by a railroad company not to construct its railroad to a certain point, or not to erect stations within a given limit, is contrary to the rights of the public, and void. "Railroad companies, in order to fulfil one of the ends of their creation, — the promotion of the public welfare, — should be left free to establish and re-establish their depots wheresoever the accommodation or the wants of the public may require." *Pueblo, &c. R. R. Co. v. Taylor*, 6 Col. 1; *Marsh v. Fairbury, &c. Ry. Co.*, 64 Ill. 416; *St. Louis, &c. R. R. Co. v. Mathers*, 71 Ill. 592. Compare *Bestor v. Wathen*, 60 Ill. 140; *Linder v. Carpenter*, 62 Ill. 309.

¹ *Pierce v. Drew*, 136 Mass. 75.

² *Friedman v. Gold & Stock Tel. Co.*, 32 Hun, 4. Compare *State v. Bell Telephone Co.*, 36 Ohio St. 296; *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 49 Conn. 358.

It is not part of the duty of telegraph companies to collect and transmit information for the benefit of the public. *Metropolitan Grain, &c. Exchange v. Chicago Board of Trade*, 15 Fed. Rep. 847.

³ *American Union Tel. Co. v. Union Pacific Ry. Co.*, 1 McCrary, 188; *Central Branch, &c. R. R. Co. v. Western Union Tel. Co.*, Id. 551.

⁴ *Lumbard v. Stearns*, 4 Cush. 60. See also *Spring Valley Water-Works v. Schottler*, 110 U. S. 347, 354.

supplying a village with pure water, and authorizing them to take springs, lands, and other rights, under the power of eminent domain, was unconstitutional, because it contained no express provision requiring the company to supply all families and persons who should apply for water on reasonable terms; that the company might act capriciously and oppressively; and that the use for which the power of eminent domain had been granted could not therefore be considered a public one. But the Supreme Court of Massachusetts held that such action of the company would be a plain abuse of their franchise, and that by accepting the act of incorporation they impliedly undertook to perform all the public duties required by it.

For the same reasons, it follows that a gas company, accepting an exclusive right to lay gas-pipes through the streets of a city, would impliedly assume an obligation to supply gas to all applicants upon the payment of a reasonable price;¹ and the State would have constitutional power to enact laws to secure the rights of the public, by preventing the company from making unreasonably high charges.²

§ 1180. *Traffic Arrangements among competing Railroad Companies.* — It is clearly to the interest of railroad companies operating competing lines to make such arrangements among themselves as will prevent ruinous competition, and secure to each company a fair share of the competitive traffic at reasonable rates. Arrangements of this character are directly conducive to the prosperity of the companies, by increasing the profits of their legitimate business, and, in many instances, are a necessary means of preventing ruinous loss and insolvency. It is but reasonable, therefore, to hold that railroad companies are impliedly authorized by their charters to enter

¹ Compare *People v. Manhattan Gas Light Co.*, 45 Barb. 186; *City of St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69, 117.

² *Supra*, § 1075 b. *State v. Columbus Gas Light, & Co.*, 34 Ohio St. 572; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650. In *Spring Valley Water-Works Co. v.*

Schottler, 110 U. S. 347, 354, Chief Justice Waite said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*."

into such arrangements, unless some positive prohibition of the statutory or common law renders them illegal.¹

§ 1181. It has been claimed that traffic arrangements among competing railroad companies are illegal, because the common law prohibits any agreement or combination in restraint of competition, for reasons of public policy.²

It is certainly not true that *all* agreements or combinations restricting competition are illegal at common law. In some of the cases, it has been held that an agreement not to carry on a business or profession is invalid, if an unreasonable restraint of trade; and so it has been held that an agreement of service is not binding if an unreasonable restraint of personal freedom. Various grounds have been assigned for this; but the main ground, on which the decisions rest, appears to be, that it is contrary to public policy to allow any person to impose an unreasonable restriction upon his freedom of action and power of earning a livelihood. It is evident that these decisions are not based on the ground that the agreements in question were injurious to the public because in restraint of competition, for similar agreements, whose sole object and effect were to prevent competition between the contracting parties, have often been sustained. Agreements of this character have been condemned by the courts only when their effect was to place a restraint upon the liberty of action of one of the parties, not required as a reasonable protection of the other party against competition.³

¹ See *supra*, § 362 *et seq.* An agreement on the part of a railroad company to charge unreasonably high fares, or to discriminate among shippers, or to deprive the public of any of the facilities of transportation, would be illegal, irrespective of any restraint of competition, because such an agreement would be in violation of the duties which a railroad company owes to the public. See *supra*, § 1115 *et seq.*

² See *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Hartford, &c. R. R. Co.*

v. New York, &c. R. R. Co., 3 Robertson, 411, 415; *Stewart v. Erie, &c. Transportation Co.*, 17 Minn. 372; *Central R. R. Co. v. Collins*, 40 Ga. 640. *Contra*, *Hare v. London, &c. Ry. Co.*, 2 J. & H. 80; *Collins v. Locke*, L. R. 4 App. Cas. 674.

³ For a full collection of the cases on this subject, see *Mitchel v. Reynolds*, 1 Smith's Lead. Cas., 8th ed., 417; *Pollock's Principles of Contracts*, 310-319; 2 *Parsons on Contracts*, *747.

In *Kellogg v. Larkin*, 3 Chandler (Wis.), 133, 159, *Howe, J.*, deliver-

It has been held that a combination or agreement the effect of which would be to increase the price of any of the necessities of life, by creating a monopoly or scarcity of supply, is contrary to public policy, and illegal at common law; and there are various instances in which combinations have been condemned as unlawful, because in violation of other general principles of the common law, or of the policy of the State as indicated by its statutes.¹ But these cases are far from establishing the proposition that *all* combinations affecting prices, or in restraint of competition, are illegal.

Even if there were such a rule as has been claimed applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and "wars" among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by

ing the opinion of the court, said: "I apprehend it is not true that 'competition is the life of trade,' on the contrary, that maxim is one of the least reliable of the host that may be picked up in every marketplace. It is in fact the shibboleth of mere gaming speculation; and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest, that for the last quarter of a century competition in the trade has caused more individual distress, if not more public injury, than the want of competition. . . . It seems to me not a little remarkable that, in the case of *Stanton v. Allen*, it should have been urged against the agreement that its object was to exempt the standard of freights 'from the wholesome influence of rivalry and competition.' For it is very certain that because of that very pur-

pose, — because they did tend to protect the party against the influence of rivalry and competition, — courts of law have upheld like agreements in partial restraint of trade, ever since the case of *Mitchel v. Reynolds* was decided."

¹ *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Pittston, &c. Coal Co.*, 68 N. Y. 558; *Raymond v. Leavitt*, 46 Mich. 447; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *India Bagging Ass. v. Kock*, 14 La. Ann. 164. See also *People v. Stephens*, 71 N. Y. 527; *Ray v. Mackin*, 100 Ill. 246; *Marsh v. Russell*, 66 N. Y. 288; *Rex v. Journeymen Tailors*, 8 Mod. 10; *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111; *People v. Fisher*, 14 Wend. 9; *Regina v. Rowlands*, 17 Q. B. 671; *Hilton v. Eckersley*, 6 El. & Bl. 47.

law, irrespective of any combination, to charge more than reasonable rates.¹

It should be observed, also, that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they think they see a fair chance of profit; and if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and apply their capital and labor to other uses, until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad cannot be withdrawn when competition renders the operation of the road unprofitable. A railroad is of no use except for railroad purposes, and, if the operation of the road were stopped, the capital invested in its construction would be wholly lost. Hence it is for the interest of a railroad company to operate its road, though the earnings are barely sufficient to pay the operating expenses. The ownership of the road may pass from the shareholders to the bondholders, and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause the ultimate bankruptcy of the companies unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges.²

Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin; and, so far as agreements among the companies are designed to prevent this result, their purpose is not injurious to the public, or illegal.³ Moreover, such

¹ See *supra*, § 1117.

² See the reports and arguments of Mr. Albert Fink, Chairman of the Trunk Line Executive Committee. See also a treatise entitled "Railroad Transportation, its History and its Laws," by Arthur S. Hadley; and an article by Judge Cooley, en-

titled "Popular and Legal Views of Traffic Pooling," published in the Railway Review of April 26, 1884.

³ In *Hare v. London, &c. Ry. Co.*, 2 J. & H. 80, 108, Vice-Chancellor Page-Wood said: "It is a mistaken notion that the public is benefited by pitting two railroad companies

agreements are positively beneficial to the public, so far as they prevent the fluctuation of rates and unjust discrimination among shippers, which invariably attend the unrestricted competition of rival companies.

It is therefore impossible to support the proposition, that *all* agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy, and unlawful; but if an agreement of this character is a reasonable business arrangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts.

§ 1132. **Remedies to enforce the Performance of Public Duties.** — **Mandamus.** — If a corporation fails in the performance of its duties to the public, it may be punished by indictment, or by forfeiture of its charter through a proceeding of *quo warranto*; or the company may be compelled to perform its duty by writ of mandamus.¹ The remedy by mandamus may, in such case, be obtained by a private person. In *Union Pacific Railroad Company v. Hall*,² the Supreme Court of the United States said: "There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer."

Ordinarily, a bill in equity is not the proper remedy to

against each other until one is ruined, the result being at last to raise the fares to the highest possible standard."

¹ *Union Pacific R. R. Co. v. Hall*, 91 U. S. 348; s. c. 3 Dill. 515, 4 Dill. 479, and cases cited; *Chicago, &c. Ry. Co. v. Crane*, 118 U. S. 424; *Easton v. Lehigh Water Co.*, 97 Pa. St. 554; *Chicago, &c. Ry. Co. v. People*, 56 Ill. 865; *King v. Severn, &c. Ry. Co.*, 2 B. & Ald. 646; *People v. Hartford, &c. R. R. Co.*, 29 Conn.

538; *High on Extraordinary Legal Remedies*, §§ 431-433.

It is held that a writ of mandamus is the proper remedy to compel a corporation to perform a legal duty enjoined by its charter or a general law; but to secure the specific performance of a duty created by contract, a bill in equity is the proper remedy. *State v. Paterson, &c. R. R. Co.*, 43 N. J. Law, 505.

² 91 U. S. 343, 355; and see the cases cited in the next section.

compel a corporation to perform its public duties. But if a corporation should threaten to violate a duty which it owes to the public, any member of the public who would suffer an immediate injury, for which there is no other adequate remedy, may restrain the threatened wrong by injunction.¹ So the State may sue in equity to prevent a corporation from violating its duties to the injury of the public, if there is no other practicable remedy.²

If a corporation which has received a grant of public aid to enable it to perform a public service wholly fails to perform this service, or to fulfil the purpose of the grant, the State may revoke its grant, for the breach of an implied condition. But vested rights which have been created by the corporation with the express or implied consent of the State, before the revocation of the grant, cannot be impaired.³

§ 1133. **Cases in which a Writ of Mandamus has been granted.**—In *People v. New York Central Railroad Company*,⁴ it was held that, if a railroad company wrongfully refuses to receive and carry freight, to the injury of the public generally, a writ of mandamus should be granted at the suit of the Attorney-General, commanding the company to resume the discharge of its duties, by promptly receiving, transporting, and delivering all such freight as is offered for transportation, on the usual and reasonable terms and charges. Davis, C. J.,

¹ See *supra*, § 1042. Compare *Rogers Locomotive, & Works v. Erie Ry. Co.*, 20 N. J. Eq. 379; *Southern Express Co. v. St. Louis, &c. Ry. Co.*, 10 Fed. Rep. 210, 869. The latter case was reversed by the Supreme Court, without passing upon the question of practice. *Supra*, § 1118.

It is clear that a private individual cannot sue to redress an injury to the public in general. See *Shackley v. Eastern R. R. Co.*, 98 Mass. 98; *Buck Mountain Coal Co. v. Lehigh Coal, &c. Co.*, 50 Pa. St. 91; *McCann v. Nashville R. R. Co.*, 2 Tenn. Ch. 773; *supra*, § 1041.

² *Supra*, § 1043. *Atty.-Gen. v. Mid Kent Ry. Co.*, L. R. 3 Ch. 100; *Buck Mountain Coal Co. v. Lehigh Coal, &c. Co.*, 50 Pa. St. 91.

Compare *People v. Albany, &c. R. R. Co.*, 24 N. Y. 261. The opinion expressed by Wright, J., in this case, that a railroad company is under no obligation to operate its railroad, was disapproved of by the majority of the judges, and is clearly erroneous.

³ *Re Mechanics' Society*, 31 La. Ann. 627; *Erie, &c. R. R. Co. v. Casey*, 26 Pa. St. 287, 307.

⁴ *People v. New York, &c. R. R. Co.*, 28 Hun, 543, 552.

delivering the opinion of the court, said: "The writ of mandamus has been awarded to compel a company to operate its road as one continuous line;¹ to compel the running of passenger trains to the terminus of the road;² to compel the company to make fences and cattle guards;³ to compel it to build a bridge;⁴ to compel it to construct its road across streams, so as not to interfere with navigation;⁵ to compel it to run daily trains;⁶ to compel the delivery of grain at a particular elevator;⁷ to compel the completion of its road;⁸ to compel the grading of its track so as to make crossings convenient and useful;⁹ to compel the re-establishment of an abandoned station;¹⁰ to compel the replacement of a track taken up in violation of its charter;¹¹ to prevent the abandonment of a road once completed;¹² and to compel a company to exercise its franchises.¹³ These are express or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is, indeed, the *ultima ratio* of their existence,—the great and sole public good for the attainment and accomplishment of which all the other powers and duties are given or imposed. . . . We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by mandamus to exercise its duties as a carrier of freight and passengers."

§ 1134. **When a Mandamus will not be granted.**—There are many cases, however, where the performance of a public duty

¹ Union Pacific R. R. Co. v. Hall, 91 U. S. 343; 3 Dill. 515; 4 Dill. 479. ⁸ Farmers' Loan, & Co. v. Henning, 17 Am. L. Reg. (n. s.) 266.

² State v. Hartford, & Co. R. R. Co., 29 Conn. 538. ⁹ People v. Dutchess, & Co. R. R. Co., 58 N. Y. 152; New York, & Co. R. R. Co. v. People, 12 Hun, 195;

³ People v. Rochester, & Co. Ry. Co., 14 Hun, 873; 76 N. Y. 294. ⁷ 74 N. Y. 302; Indianapolis, & Co. R. Co. v. State, 37 Ind. 489.

⁴ People v. Boston, & Co. R. R. Co. 70 N. Y. 569. ¹⁰ State v. New Haven, & Co. Ry. Co., 37 Conn. 154.

⁵ State v. Northeastern R. R. Co., 9 Rich. 247. ¹¹ Rex v. Severn, & Co. Ry. Co., 2 B. & Ald. 646.

⁶ Re New Brunswick, & Co. Ry. Co., 1 P. & B. (N. B.) 667. ¹² Talcott v. Pine Grove, 1 Flipp. 145.

⁷ Chicago, & Co. Ry. Co. v. People, 56 Ill. 365. ¹³ People v. Albany, & Co. R. R. Co., 24 N. Y. 261.

by a corporation cannot be compelled by writ of mandamus, though the duty itself be clear. The propriety of issuing the writ of mandamus depends in part upon the character of the acts to be enforced. A court should never attempt to compel the specific performance of an obligation, where it is apparent that the attempt would prove unavailing. And hence the writ of mandamus should not, as a rule, be issued in order to enforce the performance of a duty involving the exercise of a large measure of good faith and discretion on the part of the obligor.¹

It may be doubted, therefore, whether it be a rule applicable in all cases, that the courts will compel a railroad company to operate its line of road, even though the duty of the company be clear. The difficulty of supervising unwilling agents in the performance of a continuing duty of so complicated a nature as that of properly managing a railroad, involving the exercise of a large amount of discretion and technical skill, would in many cases prove a serious obstacle in the way of such an attempt. Whether a writ of mandamus shall be issued, is in every case a matter resting largely in the discretion of the court, and depends upon all the surrounding facts and circumstances.²

§ 1185. *Where a Remedy may be obtained by an Action for Damages.* — The writ of mandamus will not be granted on the

¹ "It is a fundamental principle of the law of mandamus, that the writ will never be granted in cases where, if issued, it would prove unavailing." *High on Mandamus*, § 14.

² It has been decided repeatedly, that specific performance of a contract to operate a railroad will not be decreed in equity, on account of the inability of a court to enforce the proper performance of such a decree. *Port Clinton R. R. Co. v. Cleveland, &c. R. R. Co.*, 18 Ohio St. 544, 549; *Blanchard v. Detroit, &c. R. R. Co.*, 81 Mich. 54, and cases cited; *Peto v. Brighton, &c. Ry. Co.*,

1 H. & M. 468; *Johnson v. Shrewsbury, &c. Ry. Co.*, 3 De G., M. & G. 914; *McCann v. Nashville R. R. Co.*, 2 Tenn. Ch. 775; *Atlanta, &c. R. R. Co. v. Speer*, 32 Ga. 550, 553. See also *Delaware, &c. R. R. Co. v. Erie Ry. Co.*, 21 N. J. Eq. 308; *Marble Co. v. Ripley*, 10 Wall. 358; *Blackett v. Bates*, L. R. 1 Ch. 117; *Hood v. Northeastern Ry. Co.*, L. R. 8 Eq. 666; L. R. 5 Ch. 525.

In *Rex v. Severn, &c. Ry. Co.*, 2 B. & Ald. 646, a writ of mandamus was granted to compel a company to lay down its tracks, which had been torn up, but not to compel the company to maintain the road.

relation of a private individual, if there is an adequate remedy by an action for damages. Hence, if a railroad company violates its common law duty as common carrier for hire, by refusing to carry, on payment of the proper charges, a writ of mandamus will not, as a rule, be granted; for adequate redress can usually be obtained in an action for damages.

This was the decision in the case of *People v. New York Central Railroad Company*.¹ Daniels, J., delivering the opinion of the court, said: "The object of this writ is to enforce and protect legal rights existing without any other appropriate or adequate remedy. It is resorted to for the purpose of preventing a failure of justice, and not as a substitute for a well-defined legal action. For that reason alone, while the relator has a clear right to have his property carried on the terms with which he offered compliance, and has been injured by the refusal of the defendant and its officers to receive and transport it, this appeal cannot be sustained."

However, if a railroad company should neglect to operate its road at all, or should systematically refuse to transport passengers or freight on reasonable terms, this would be an injury to the public in general, and under these circumstances a writ of mandamus should be granted, at the suit of the State, to compel the corporation to perform its public duties.²

§ 1136. **Remedy where a Railroad Company wrongfully refuses to construct its Railroad.** — If a railroad company should attempt to construct a railroad which it has no authority to

¹ *People v. New York, &c. R. R. Co.*, 22 Hun, 538, 540. *Ex parte Robins*, 7 Dowl. P. C. 566. Compare *State v. Delaware, &c. R. R. Co.* (Supreme Ct. of N. J., Feb. 26, 1886), 33 Alb. L. J. 245.

² *People v. New York, &c. R. R. Co.*, 28 Hun, 543.

In *Kinealy v. St. Louis, &c. Ry. Co.*, 69 Mo. 658, it was decided that an action for damages would not lie against a railroad company

on account of a depreciation of the plaintiff's property caused by the wrongful abandonment by the company of a portion of its line of road, in the absence of a contract between the company and the plaintiff that the former would continue to maintain its road and run its trains. *Martindale v. Kansas City, &c. R. R. Co.*, 60 Mo. 510; *Currier v. Concord R. R. Co.*, 48 N. H. 326.

construct, or if it should neglect to construct the railroad which its charter expressly or impliedly requires it to construct, the State may revoke the company's franchises, or restrain its unauthorized action. A grant of public aid to the company may likewise be annulled.

But, although a railroad company be under an obligation to the State to construct the whole of its road, as well as to operate it after it has been built, it is questionable whether a court should undertake to enforce the performance of an obligation of this character by writ of mandamus; for the proper construction of a railroad would necessarily involve the exercise of much technical skill and judgment, and depend largely upon the good faith of the parties directing the work.¹

¹ It has frequently been decided that a court of equity will not undertake to enforce specific performance of a contract to construct and equip a railroad. *Ross v. Union Pacific Ry. Co.*, 1 Woolw. 26; *Fallon v. Railroad Co.*, 1 Dill. 121; *Danforth v. Philadelphia, &c. Ry. Co.*, 80 N. J. Eq. 12, and cases collected in reporter's note; *Heathcote v. North Staffordshire Ry. Co.*, 20 L. J. Ch. 82; *South Wales Ry. Co.*

v. Wythes, 5 De G., M. & G. 880; *Ranger v. Great Western Ry. Co.*, 1 Eng. Ry. Cas. 51.

In *Wheatley v. Westminster, &c. Coal Co.*, L. R. 9 Eq. 552, Malins, V. C., said: "I take it that nothing is more clear than this: that this court will not undertake either the construction of a railway, the management of a brewery, or the management of a colliery, or anything of the kind."

INDEX.

INDEX.

THE REFERENCES ARE TO THE SECTIONS.

A.

ABANDONMENT,

- of subscription list by mutual consent, 68.
- of business of corporation, 412, 418, 419.
- of business, effect on liability of shareholders, 151.
- of railroad, 419, 1116, 1119. See DUTIES TO THE PUBLIC.

ABATEMENT,

- of actions by dissolution of corporation, 1081.
- corporate existence put in issue by plea in, 772, 773.

ABUSE,

- of franchises, see DISSOLUTION.
- of powers by agents, see VALIDITY OF CORPORATE ACTS.

ACCEPTANCE,

- of charter, 21-23, 25, 26, 40.
- of alteration of charter, see ALTERATION OF CHARTER.
- of subscription for shares, see SUBSCRIPTION FOR SHARES.
- of transfer of shares, 222, 223.
- of grant of property to corporation, 629, 708a.
- by agent, of appointment to office, 504.

ACCOMMODATION,

- credit of corporation cannot be lent for, 389, 423.
- paper, when binding upon corporation, 597, 602.
- issued to corporation, may be sold by it, 342 note.

ACCOUNT,

- for property or funds received under void agreement, 714-724. See VALIDITY OF CORPORATE ACTS, III. G.
- by agents receiving profits at expense of company, 525.

ACQUIESCENCE. See RATIFICATION AND ACQUIESCENCE.

ACTS OF THE LEGISLATURE. See also STATUTES.

- incorporation laws, see INCORPORATION LAWS.
- construction of, see CONSTRUCTION OF CHARTERS.
- constitutionality of, see LEGISLATIVE CONTROL.

ACTION. See SUITS; REMEDIES.

[THE REFERENCES ARE TO THE SECTIONS.]

ADJOURNED MEETINGS,

of shareholders, 489.

ADMINISTRATOR. See **EXECUTORS AND ADMINISTRATORS.**

ADMISSIONS,

when admissible in evidence, see **PROOF.**

AGENTS,

responsibility of a corporation for the acts of, see **VALIDITY OF CORPORATE ACTS, I.**

promoters, see **PROMOTERS.**

directors, see **DIRECTORS.**

ratification of acts of, see **RATIFICATION.**

implied power of appointing, 508.

how appointment may be made, 504.

formalities of appointment when necessary, 583, 676.

informal appointment, when immaterial, 636-640.

qualifications, when necessary, 505-507.

by-law requiring security from, 492.

de facto officers, 543 *a*, 636-640.

scope of authority how determined, — general rule, 509, 590.

authority limited by the charter, 579.

authority conferred by charter cannot be impaired, 511.

powers are delegated by the shareholders, 515.

fiduciary relation of managing agents, 516.

cannot represent corporation in dealing with themselves, 508, 517-527.

cannot use their powers for their own profit, 517-519, 525.

interest in other company, when a disqualification, 520, 521.

cannot represent both parties to a transaction, 528-530.

may deal with company if represented by other agents, 521, 527, 530.

right of corporation to repudiate unauthorized transactions, 522.

whether transactions unauthorized by reason of personal interest are "void or voidable," 523, 524.

remedies of corporation where agents violate their duty, 525.

powers of directors, 510-515. See **DIRECTORS.**

powers of president, 537, 588. See **PRESIDENT.**

powers of cashiers, 539, 540. See **CASHIER.**

powers of agents accepting subscriptions for shares, 64, 66, 102, 103.

powers of agents receiving subscriptions on special terms, 83-85.

powers of managing agent of a mine, 509.

power to act in foreign States, 359-361, 958, 963.

power to regulate transfer of shares, 164, 165.

power to sue in name of corporation, 238-240.

power to receive service of process, 979-983.

power to make preferences among creditors, 802-805.

delegation of authority, 534-536.

[THE REFERENCES ARE TO THE SECTIONS.]

AGENTS, — continued.

- appointment of subordinate agents, 534–536.
- admissions and declarations of agents, where admissible in evidence, 540 *a*.
- notice to agents, 540 *b*, 540 *c*.
- revocation of powers of, 541.
- removal from office, 541–544.
- liability of corporation for acts of, see **VALIDITY OF CORPORATE ACTS, I**.
- liability of agents to the corporation, 550–562.
- remedies of the corporation against, 525.
- liability to shareholders at common law, 565–567.
- liability to creditors at common law, 568.
- of insolvent corporation, liability to creditors, 787, 788, 795, 796.
- liability to creditors under statutes, 906–911.
- liability for torts, 569–574.
- liability for misappropriation of funds deposited with corporation, 569.
- liability for false representations, 570–574.
- liability for issuing false reports and certificates, 573, 574.

AGGREGATE CORPORATION,

- distinguished from corporation sole, 2.

ALLOTMENT OF SHARES,

- where required, 58, 78.
- under English Companies Acts, 70.
- agents cannot delegate power of, 64, 536.

ALTERATION,

- of subscription for shares, 77 note.
- of articles of association after subscription, 62, 63.
- of business, directors cannot make, if radical, 512.

ALTERATION OF CHARTER,

- power of the legislature to make, 1044–1090. See **LEGISLATIVE CONTROL, I**.
- effect of reservation of power to make, 404–406, 1093. See **LEGISLATIVE CONTROL, II**.
- not impliedly authorized, 395–401.
- of foreign corporation, 1059.
- contrary authorities criticised, 402, 403.
- majority cannot make, 645.
- applications to the legislature for, 295–301, 397.
- contracts in anticipation of, not authorized, 398.
- when a ground for rescinding membership, 119–121.
- authorized if provided for in charter, 407.
- ratification by the shareholders, 623.
- creditors cannot prevent, 807.
- grant of new franchises is not, 399, 1033.

[THE REFERENCES ARE TO THE SECTIONS.]

- ALTERATION OF CHARTER**, — *continued*.
 discharge from obligation to State is not, 400, 1084.
 general legislation is not, 401.
 repeal of law incorporated in charter is not, 1081, 1082.
- AMALGAMATION**. See **CONSOLIDATION**.
- AMENDMENT OF CHARTER**. See **ALTERATION OF CHARTER**.
- APPLICATION TO THE LEGISLATURE**,
 for alteration of charter when restrained, 295-301, 397.
- APPLICATION FOR SHARES**,
 contract when complete by allotment, 70.
- APPOINTMENT OF AGENTS**. See **AGENTS; DIRECTORS**.
- APPORTIONMENT**,
 of shares among subscribers, 26, 66.
- ARTICLES OF ASSOCIATION**. See **CHARTERS**.
 form of, and designation of purposes, 27, 320 note.
 necessity of filing, 27.
 unauthorized provisions do not vitiate, 32.
 alteration before incorporation discharges subscribers, 62, 63.
 construction of, 318, 320 note. See **CONSTRUCTION OF CHARTERS**.
 parties dealing with corporation must take notice of, 591.
- ASSAULT AND BATTERY**,
 liability of corporation for, 727.
- ASSENT**,
 of subscriber necessary to subscription, 62, 63.
 of shareholders to corporate act, effect of, 228.
- ASSESSMENTS**. See **CALLS; LIABILITY OF SHAREHOLDERS**.
- ASSETS**,
 rights of creditors against, see **CREDITORS**.
 distribution of, see **WINDING UP; DISSOLUTION**.
- ASSIGNEE, STATUTORY**. See **RECEIVERS**.
 of foreign corporation recognized, 988.
 of insolvent corporation, powers, 819, 822, 868, 869.
 of shareholder not liable as shareholder, 159 note.
- ASSIGNMENT**,
 of shares or certificates, see **TRANSFER OF SHARES; SALES**.
 of negotiable obligations of corporation, 602, 603.
 of non-negotiable obligations, 604.
 by corporation, of liability of shareholders, 819.
 by corporation, for benefit of creditors, 802-805.
- ASSOCIATES**,
 when grantees of charter need not take, 26.
- ATTACHMENT**,
 of shares after assignment of certificates, 196-199.
 of shares in foreign corporation, 977 note.
 of assets of insolvent corporation, 864.

[THE REFERENCES ARE TO THE SECTIONS.]

ATTACHMENT, — *continued*.

of liability of shareholders to corporation, 819.
foreign corporation may be garnishee, 977 note.

ATTORNEY,

at law, who may employ, 535.
power under seal unnecessary, 388.
to transfer shares, who may act as, 172.

ATTORNEY-GENERAL.

when entitled to equitable remedies against corporation, 1041,
1043.
when entitled to judgment of dissolution, see **DISSOLUTION**.

B.

BANKS AND BANKING,

as to national banks, see **NATIONAL BANKS**.
as to savings banks, see **SAVINGS BANKS**.
powers of agents, see **AGENTS**; **CASHIER**.
judicial notice taken of the banking business, 382.
banks may borrow and lend and execute securities, 383.
what property banks may acquire, 386.
place of business of, 360, 387.
special deposits by, 388, 540.
collections by, 389.
accommodation indorsements unauthorized, 389.
effect of restraining law, 670.
State banks, whether public or private, 8.
suspension of payments a cause for dissolution, 1026, 1027.
laws regulating, constitutional, 1072.
laws providing for winding up insolvent banks constitutional,
1077.

BANKRUPTCY. See **WINDING UP**.

corporation may be petitioning creditor, 357.
whether directors can file petition in, 513.
of corporation does not dissolve, 1010, 1013 note.
of director, vacates office, when, 542 note, 506.
of shareholders, effect on right to vote, 483.
of corporation, rights of creditors, see **CREDITORS**.

BEQUEST. See **DEVISE**.

to corporation of shares in itself, 114.
of "income and profits" of shares, see **GRANTS OF INCOME AND
PROFITS OF SHARES**.

BILLS AND NOTES. See **NEGOTIABLE INSTRUMENTS**.

BOARD OF DIRECTORS. See **DIRECTORS**.

meetings of, see **MEETINGS OF DIRECTORS**.

[THE REFERENCES ARE TO THE SECTIONS.]

BONA FIDE PURCHASER,

- of certificate for shares, see **CERTIFICATE FOR SHARES.**
- of negotiable instruments, see **NEGOTIABLE INSTRUMENTS.**
- excess of charter, when not a defence against, see **VALIDITY OF CORPORATE ACTS, I. B, III. D.**

BONDS,

- of corporation, when negotiable, 341.
- of municipality, rights of purchasers, 612-615.

BOOKS OF CORPORATIONS. See PROOF.

- right of shareholders to examine, 473.
- when evidence against the corporation, 540 *a*, note.
- when evidence of acceptance of charter, 40.
- when evidence of subscriptions, 75, 76.
- subscription on stock-books, see **SUBSCRIPTION FOR SHARES.**
- transfer of shares on, see **TRANSFER OF SHARES.**

BORROWING MONEY,

- implied right of corporation to borrow, 342, 343, 347.
- construction of limitations upon the right, 344, 345.
- by banks, 388. See **BANKS AND BANKING.**
- liability where authority is limited to a gross sum, 600, 601.
- liability for unauthorized loans, 695, 716, 717. See also **VALIDITY OF CORPORATE ACTS.**

BURDEN OF PROOF. See PRESUMPTIONS; PROOF.

BUSINESS,

- how the business of a corporation may be carried on, see **CONSTRUCTION OF CHARTERS.**
- when subscription of capital is a condition precedent to right to begin, 408-410.
- winding up, see **WINDING UP.**

BY-LAWS,

- the power of making, 491.
- how adopted, 498.
- of public and private corporations distinguished, 491, 596.
- published rules and regulations distinguished from, 501.
- what by-laws are valid, 492, 493.
- regulating manner of holding meetings, 487.
- regulating manner of transferring shares, 164, 168, 197.
- reserving lien on shares, 201, 203.
- regulating and prescribing qualifications of agents, 492.
- giving right to vote by proxy, 486.
- what by-laws are invalid, 494-496.
- construction of by-laws, 497.
- repeal of by-laws, 499, 492 note.
- upon whom binding, 500.
- confer no rights on strangers, 500.
- whether directors and shareholders deemed to have notice of, 500 *a*.
- when notice must be taken of, 598-595.

[THE REFERENCES ARE TO THE SECTIONS.]

C.

CALL,

of meeting of shareholders, 480, 481.

CALLS,

the necessity of, to charge shareholders, 143.

not necessary where time of payment fixed, 144, 149.

not necessary to fix liability to creditors, 821, 822.

who can make, 145.

power to make, cannot be delegated, 145, 536.

amount and time of, 146.

notice of, 147, 154.

discretion of directors as to amount of, 150, 151, 243.

unauthorized, whether shareholders liable to pay, 150-155.

remedy of shareholder where call unauthorized, 150, 279.

must be fair to all shareholders, 154, 279.

if unauthorized, cannot be ratified by corporation, 155.

liability for, after a transfer of shares, 161.

waiver of, 157.

proceedings to recover, — proofs, 158.

CANCELLATION OF SHARES. See SUBSCRIPTION FOR
SHARES, IV.

nature and effect of, 111.

distinguished from cancellation of certificate, 111.

not authorized, general rule, 109.

differs from rescission of contract to purchase, 110, 118.

purchase of shares by the corporation amounts to, 112-114.

when a corporation may accept shares in itself, 114.

authorized when the result of a compromise, 114.

violation of charter not a cause for, 115-117.

alteration of charter, when a cause of, 119, 120.

effect of alteration of charter under reserved power, 121.

invalid as to creditors, 841.

statutory liability to creditors not discharged by, 891 note.

of certificates for shares, see CERTIFICATE FOR SHARES.

CAPITAL STOCK,

object of fixing amount, 137, 781.

increase or reduction not impliedly authorized, 434.

subscription of whole amount, when necessary, 29, 137-142, 408-410.

payment of, 425-429.

unauthorized issue as paid up, causes of action, 286-290.

reduction of, see REDUCTION OF CAPITAL STOCK.

increase of, see INCREASE OF CAPITAL STOCK.

liability of shareholders to contribute capital, see LIABILITY OF
SHAREHOLDERS.

rights of creditors as to, see CREDITORS.

distribution of, see DIVIDENDS; WINDING UP.

[THE REFERENCES ARE TO THE SECTIONS.]

CARRIERS. See RAILROAD COMPANIES.

duties of, at common law, 1117.

CASHIER,

of bank, powers of, 539, 540, 598 note.

where authority of, may be assumed, 587, 593, 597.

CAUSE OF ACTION. See REMEDIES.

of shareholders, see SHAREHOLDERS.

against agents, see AGENTS.

CERTIFICATES FOR SHARES,

legal character of, 185, 186, 193, 200, 226.

need not be under seal, 338 note.

liability of corporation issuing, 186, 600, 605.

liability of agents issuing fraudulent, 187, 574.

lost or destroyed certificates, 188.

assignment of shares by indorsement of, 185.

indorsement of, a warranty of genuineness, 191.

effect of assignment of, 189, 195.

rights of *bona fide* purchasers, 190, 603, 836.

effect of power of attorney indorsed in blank, 192.

rights of creditors of shareholders on books after assignment of certificate, 193-200.

rights of attaching creditors of assignor, 196-199.

execution against shares after assignment, 200.

right of shareholder to have, 472.

remedy where corporation refuses to issue, 212-221, 236.

agent refusing, not liable to shareholder, 565.

not necessary to make subscriber shareholder, 56.

not necessary to effect transfer of shares, 173.

tender of, when necessary, 61, 148.

production not necessary before payment of dividends, 162, 170.

surrender necessary before transfer, 172.

notice of rights of equitable owners, 181-184.

unauthorized issue as paid up, rights of innocent purchasers, 603, 836.

issue as paid up, equities of creditors, see CREDITORS.

issue as paid up, equities of shareholders, 306.

issue as paid up for less than value, causes of action resulting from, 286-290.

when unauthorized issue may be restrained, 275.

issued in excess of authorized capital, rights of holder, 683, 761.

liability of corporation for unauthorized issue of, 600, 605.

statute prohibiting issue except on prescribed condition, 679.

CERTIFICATE OF INCORPORATION,

when necessary, 27, 30, 67.

power of officer to refuse, 15, 27.

[THE REFERENCES ARE TO THE SECTIONS.]

CHANCERY. See **EQUITY.**

CHARGES,

constitutionality of laws regulating, 1074-1075 *d*, 1094.
of railroad companies must be reasonable, 1117.
unjust discrimination as to, 1117.
validity of pooling arrangements as to, 1130, 1131.

CHARITABLE CORPORATION,

meaning of term, 4.
not composed of shareholders, 34.
ratification of acts of agents of, 621.
functions of charter of, 1046, 1049.
constitutionality of laws altering purposes of, 1045, 1046, 1049.

CHARTER OF CORPORATION,

meaning of term, 318, 967.
functions of, 1046-1050.
who can grant, 8-17. See **FORMATION OF CORPORATIONS.**
constitutionality of grant of, 10-16, 759, 760.
conditions of grant of, 27.
what operates as a grant of, 18, 19.
acceptance of, 21-23.
construction of, see **CONSTRUCTION OF CHARTERS.**
of company incorporated in several States, 997.
power to transfer or mortgage, 928. See **FRANCHISES.**
obtained by fraud, validity of, 769.
forfeiture or expiration of, see **DISSOLUTION.**
alteration of, see **ALTERATION OF CHARTERS.**
legislation impairing, see **LEGISLATIVE CONTROL I.**
reservation of power over, see **LEGISLATIVE CONTROL II.**
judicial notice when taken of, 38, 39.
party dealing with corporation must take notice of, 591, 595.

CHATELS,

certificates for shares are, 193, 200, 226.

CHOSES IN ACTION,

shares are, 193, 200, 225.

CHURCH. See **RELIGIOUS CORPORATIONS.**

CITIZENSHIP,

of subscribers for shares immaterial, 35.
corporation not entitled to rights and immunities of, 970.
of corporations with respect to federal courts, see **UNITED STATES COURTS.**

CIVIL CORPORATION,

meaning of term, 4.

CLUB,

construction of charter of, 320, note.
expulsion for violating by-law of, 493, 277.

[THE REFERENCES ARE TO THE SECTIONS.]

- COLLATERAL TRANSACTIONS**,
to corporate business, when authorized, 364, 367, 368.
- COLORABLE SUBSCRIPTIONS.** See **FICTITIOUS SUBSCRIPTIONS.**
- COMBINATION**,
among shareholders to control management, 477.
among railroad companies to prevent competition, 1130, 1131.
- COMITY AMONG STATES**,
as to foreign companies, see **FOREIGN CORPORATIONS.**
- COMMERCE AMONG STATES**,
laws regulating foreign corporation when an interference with, 972-974 a.
laws regulating charges of railroad company, 1075 d.
- COMMISSIONERS**,
receiving subscriptions for shares, powers, 64, 66, 83.
receiving subscriptions, representations by, 102.
- COMMITTEE**,
appointment of, by directors, 534, 535.
- COMMON CARRIERS.** See **RAILROAD COMPANIES.**
duties of, 1117.
remedies for breach of duty by, 1135.
- COMPENSATION**,
of officers, 508.
for services rendered under void contract, 526.
- COMPETITION**,
legality of contracts in restraint of, 1131.
- COMPROMISE**,
corporation may enter into, 424, 430.
discharging shareholder, 302, 313 note, 341.
- CONDEMNING LAND.** See **EMINENT DOMAIN.**
- CONDITIONAL SUBSCRIPTIONS.** See **SUBSCRIPTIONS FOR SHARES, II.**
- CONDITION PRECEDENT**,
to right of forming corporation, see **FORMATION OF CORPORATIONS.**
to right of forming corporation, effect of failure to perform, see **ILLEGAL INCORPORATION.**
to right of commencing business distinguished, 29, 30, 408-410.
to subscriptions for shares, see **SUBSCRIPTIONS FOR SHARES.**
of contract to subscribe or purchase shares, 52.
to liability of shareholders, see **LIABILITY OF SHAREHOLDERS.**
to statutory liability of shareholders, 833-835.
- CONDONATION.** See **RATIFICATION.**
- CONFESSION OF JUDGMENT**,
by corporation, when authorized, 430.

[THE REFERENCES ARE TO THE SECTIONS.]

CONGRESS,

power to charter corporations, 9.
character of corporations chartered by, 984-987.
may authorize Territorial governments to charter, 17.
national banks chartered by, see NATIONAL BANKS.

CONSIDERATION,

of subscription for shares, 133.
of contract to purchase shares, 134.
of grant of franchises, 1053, 1054.
of contract under seal of corporation, 341.

CONSOLIDATION,

meaning of term, 939.
authority to consolidate not implied, 396, 940.
majority cannot effect, 646.
when consolidation is authorized, 941, 951.
when shareholders may prevent, 395, 396, 951.
ratification by the shareholders, 623.
effect of consolidation, 939, 942-957.
general character of corporations formed by, 943.
under laws of different States, 1000, 1001.
statute authorizing, is an act of incorporation, 944, 945.
franchises of corporation formed by, 946-949.
legislative control under reservation of power over corporation
formed by, 944, 945, 1109.
duties to public of corporation formed by, 950.
rights of shareholders in consolidating companies, 951.
property and contracts, how affected by, 952-957, 229.
rights of corporation formed by, 953, 956.
rights of creditors how affected by, 809, 954-957.
liability of the consolidated company, 791, 955.
equities of creditors, 791, 956, 957.
rights of creditors, when provided for by the charter, 818.
validity of irregular consolidation, 757, 697.

CONSTITUTIONAL LAW,

constitutionality of legislation affecting corporations, see LEGISLA-
TIVE CONTROL.
limitation of power of legislature to charter corporations, 10-14.
See FORMATION OF CORPORATIONS.
prohibition against special and local laws, 10-14.
validity of formation of corporation under unconstitutional act,
759, 760, 694.
grant of State aid to corporations, 1114.
constitutional rights of foreign corporations, 970-974.
rights of creditors cannot be impaired by law, 814-817.

CONSTRUCTION OF CHARTERS,

definition of "charter," 818.

[THE REFERENCES ARE TO THE SECTIONS.]

CONSTRUCTION OF CHARTERS, — *continued*.

- I. *General rules of construction*, 316-320.
 - articles of association governed by same rules, 318, 320 note.
 - what is implied, 320.
 - express prohibitions, general rule of construction, 321.
 - implied prohibitions, 322.
 - prohibition from course of dealing, 321.
 - grants of special franchises, 322.
 - presumptions as to charters, 324.
 - powers incidental to all corporations, 325.
 - implied right of acquiring property, 327, 330. See **PROPERTY**.
 - provisions limiting right to acquire property, 328, 329.
 - when corporation may take by devise, 331-333.
 - when corporation may hold in trust, 334.
 - transfer of property, when authorized, 335.
 - implied right of contracting, 336. See **CONTRACTS**.
 - when use of seal necessary 338. See **SEAL**.
 - consequences of sealing, 339-341.
 - right to borrow and incur debts, when implied, 342, 343, 347. See **BORROWING MONEY**.
 - right to incur debts after the right to borrow has been exhausted, 344, 345.
 - right of mortgaging, when implied, 346, 347. See **MORTGAGE**.
 - mortgages of manufacturing corporations in New York, 348.
 - right to pledge property, 347, 349.
 - right to execute negotiable obligations, 350-352. See **NEGOTIABLE INSTRUMENTS**.
 - the right to use a corporate name, 353. See **NAME**.
 - effect of a misnomer, 354, 355.
 - right to sue and be sued, 356. See **REMEDIES**.
 - remedies available to a corporation, 357, 358.
 - places where a corporation may carry on business, 359-361, 358, 363. See **FOREIGN CORPORATIONS; PLACE**.
- II. *What transactions are authorized, — general principles*, 362-367 *a*.
 - transaction not authorized merely because profitable, 363.
 - collateral and auxiliary transactions, 364, 367.
 - corporation may adapt itself to changes of circumstances, 365, 366.
 - surplus property may be used or disposed of, 367.
 - the right to practise economy, 364-367.
 - of railroad companies, see **RAILROAD COMPANIES**.
 - of banks, see **BANKS AND BANKING**.
 - of savings banks, see **SAVINGS BANKS**.
 - bad debts may be saved, how, 386, 431, 434.
 - what transactions are not authorized, — illustrations, 392, 393, 394.
 - transactions authorized in special instances, 321, 362, 386.
 - alteration of charter, when authorized, 395-407. See **ALTERATION OF CHARTERS**.

[THE REFERENCES ARE TO THE SECTIONS.]

CONSTRUCTION OF CHARTERS,—continued.

consolidation, when authorized, 396, 940, 941, 1099. **SEE CONSOLIDATION.**
 right to begin business, when conditional on subscription of capital, 408-410.
 time of existence of corporations, 411, 418.
 when a corporation must be wound up before expiration of charter, 402.
 discretionary power of majority to wind up, 413, 417.
 distribution of assets on winding up, 415-417. **SEE WINDING UP.**
 abandonment of portion of business when authorized, 419.
 when purchase of whole business of another company is authorized, 420, 422.
 right to form partnership not implied, 421.
 payment of gratuities out of corporate funds, 423, 424.
 accommodation indorsement unauthorized, 423.
 guaranty, when authorized, 423.
 compromise authorized, 424, 430.
 what may be received in payment of capital, 425-429, 386.
 the use of corporate funds to carry on legal proceedings, 430.
 purchase of shares in other company, 431, 432.
 subscription for shares in other company, 433.
 purchase of shares in the corporation, 112-114, 434.
 increase or reduction of capital stock, 434.
 payment of dividends, **see DIVIDENDS.**

CONTRACTS,

implied right of corporation to enter into, 336.
 how a corporation may contract, 337.
 when a seal is necessary, 338.
 validity and proof of sealing, 339, 340.
 effect of corporate seal, whether consideration necessary, 341.
 when authorized, **see CONSTRUCTION OF CHARTERS.**
 formalities of, **see FORMALITIES.**
 right to borrow, **see BORROWING MONEY.**
 right to mortgage, **see MORTGAGE.**
 right to pledge, **see PLEDGE.**
 right to execute negotiable paper, **see NEGOTIABLE PAPER.**
 of railroad companies, **see RAILROAD COMPANIES.**
 of banks, **see BANKS AND BANKING.**
 effect of illegality, **see VALIDITY OF CORPORATE ACTS, III.**
 of corporation *de facto*, 750-752. **SEE ILLEGAL INCORPORATION.**
 of agents with the corporation, 517-527. **SEE AGENTS; DIRECTORS.**
 of shareholders, **see SUBSCRIPTIONS FOR SHARES; CONTRACT OF MEMBERSHIP.**
 of promoters, 547-549.
 whether "void or voidable," 524.

[THE REFERENCES ARE TO THE SECTIONS.]

CONTRACTS, — *continued.*

- obligations resulting from performance of void contracts, 714-724.
- ratification of, see **RATIFICATION.**
- constitutionality of laws impairing, see **LEGISLATIVE CONTROL.**

CONTRACT OF MEMBERSHIP,

I. General nature of, 43-46.

- necessity of, to formation of corporation, 24, 25.
- assent of parties necessary, 62, 63.
- assent of State as well as subscriber necessary to legal formation of, 736.
- how formed, 54.
- by subscription for shares, 55, 66. See **SUBSCRIPTION FOR SHARES.**
- formalities when necessary, 67-69.
- conditions precedent, 57.
- validity when formed without complying with statutory forms, 73. See **ILLEGAL INCORPORATION.**
- no consideration necessary, 138.
- rescission of, see **SUBSCRIPTIONS FOR SHARES, IV.**
- proof of, 74-76.

II. Distinguished from contract to subscribe for or purchase shares, 46, 61.

- contract to form a corporation, 47-51.
- contract to subscribe in future corporation, 49.
- contract to purchase shares, allotment unnecessary, 70.
- contract to purchase shares, consideration necessary, 134.
- contract to purchase shares, conditions precedent, 52.
- novation of contract to purchase, 169.
- rescission of contract to purchase shares, 110, 118.
- contract to purchase shares means valid paid-up shares, 176, 191.

CONTRIBUTION,

- among shareholders, 811-815, 866, 894.
- among directors who have committed joint wrongs, 911.

CONVERSION,

- of shares by corporation refusing transfer, 217.
- of certificates for shares, 226.

CONVEYANCE. See PROPERTY.

- by corporation, 335.
- validity of, when in excess of charter, 707-718. See **VALIDITY OF CORPORATE ACTS, III. F.**

CORPORATE POWERS,

- what acts are authorized by a charter, see **CONSTRUCTION OF CHARTERS.**
- validity of acts in excess of the charter, see **VALIDITY OF CORPORATE ACTS.**

[THE REFERENCES ARE TO THE SECTIONS.]

CORPORATION,

- definition, 1, 18, 825, 1091, 1092.
- different meanings of term, 1-7.
- aggregate and sole, distinguished, 2.
- private and public, distinguished, 3.
- religious, charitable, and civil, distinguished, 4.
- quasi corporation, 6.
- nature of private business corporation, 7.
- compared with partnership, see **PARTNERSHIP**.
- how formed, see **FORMATION OF CORPORATIONS**.
- who constitute, 33, 34.
- who may form, 35.
- corporations by prescription, 36.
- when regarded as an entity, and when as an association, 227-234.
- foreign, see **FOREIGN CORPORATIONS**.
- chartered by several States, 991-1001.
- de facto* and *de jure*, see **ILLEGAL INCORPORATION**.
- chartered by Congress, 984-987.
- proof of existence of, see **PROOF**.
- powers of, see **CONSTRUCTION OF CHARTERS; VALIDITY OF CORPORATE ACTS**.

COURSE OF DEALING,

- construction of prohibition from, 821.

COURTS. See REMEDIES.

- of United States, see **UNITED STATES COURTS**.

CREATION OF CORPORATIONS. See FORMATION OF CORPORATIONS.**CREDITORS OF CORPORATIONS,**

- I. *Rights of creditors with respect to capital and assets*, 779-817.
 - general rights of creditors at law, 779.
 - the capital a trust fund in equity, 780.
 - the capital held out as security to, 781.
 - no rights acquired under by-laws, 500.
 - reserved power of corporation to use and manage capital, 782, 783.
 - power of corporation to transfer its assets, 784, 785, 800.
 - insolvency does not destroy powers of management, 786.
 - duties of corporate agents after insolvency, 787, 788.
 - power to make assignments with preferences after insolvency, 802-805.
 - withdrawal of capital after insolvency, 789.
 - withdrawal of capital before insolvency, 785, 790.
 - transfer of assets to another company, 791, 811-813.
 - property transferred before creditor's claims arose cannot be taken, 800.
 - creation of new debts without receipt of value, 792.
 - use of capital to purchase shares in the corporation, 112-114, 793.

[THE REFERENCES ARE TO THE SECTIONS.]

CREDITORS OF CORPORATIONS, — *continued.*

- rights where assets have been diverted to their loss, 794.
- rights against directors who have caused loss of assets, 795, 796.
- when creditors can restrain a threatened diversion of assets, 797-799.
- rights of persons dealing with corporation after a withdrawal of capital, 800, 801, 824-835.
- creditor cannot prevent dissolution, 806.
- rights of creditor after dissolution, 1035.
- creditors cannot prevent an alteration of the charter, 807.
- rights of creditors when the character of the company is altered, 807, 810.
- novation, by substitution of liability of other company, 808, 813.
- rights of creditors after consolidation, 954-957. See CONSOLIDATION.
- nominal alteration of rights of creditors immaterial, 810.
- reorganization or revivor and its consequences, 811, 812.
- substitution of liability authorized, if provided by the charter, 813.
- what legislation impairs rights of creditors, 814-817, 872. See LEGISLATIVE CONTROL, I.
- legislation under reservation of power to alter the charter, 817
- See LEGISLATIVE CONTROL.
- II. *Rights of creditors against shareholders with respect to payment of capital*, 818-868.
 - the relation between creditors and shareholders, 818.
 - liability to contribute capital is at law a debt due the corporation, 819.
 - liability to contribute capital is assets in equity, 820.
 - liability unconditional as to creditors, 821-823.
 - no call necessary, — powers of receivers and assignees, 821, 822.
 - non-subscription of entire capital not a defence, 823.
 - effect of release by corporation as to existing and future creditors, 824-831, 834.
 - when shares are paid up, as to creditors, 824 *et seq.*
 - payment of shares in property or services, 825, 826.
 - capital withdrawn by shareholders must be restored for benefit of future, as well as existing creditors, 827.
 - liability for claims arising from torts, 828.
 - parties dealing with corporation may discharge shareholders from liability, 829, 830.
 - the rule as to mining companies, 830.
 - what amount of capital creditors can call for, 831.
 - where charter authorizes shares to be declared paid up on payment of less than par, 831.
 - rights of creditors in respect to subsequent issues of shares, 832.
 - effect of an increase or reduction of the capital stock, 833.
 - cases in which capital withdrawn by shareholders cannot be recovered, 834.

[THE REFERENCES ARE TO THE SECTIONS.]

CREDITORS OF CORPORATIONS, — continued.

liability for frauds upon persons dealing with corporation after withdrawal of capital, 835.

effect of issue of certificates declaring shares to be paid up, — liability of purchaser, 836.

shareholders not responsible for depreciation of capital, 837.

profits distributed among shareholders cannot be recalled, 838.

liability of shareholders whose subscriptions were obtained by fraud, 839, 840.

cancellation of shares or release of subscriptions, 841.

conditions of subscription which would deprive creditors of security, 842.

who liable as shareholders, 848-850.

unauthorized subscription, — ratification, 843.

when subscribers are not liable to creditors, 845-851.

subscribers on condition precedent, 845.

liability of shareholders of illegally formed corporation, 755, 748, 749.

See **ILLEGAL INCORPORATION.**

liability of holders of legally void shares, 767, 849.

effect of an original issue of shares in trust or as collateral security, 850, 851.

shareholders on the stock-books are liable, 852, 854.

liability of equitable owners of shares, 853, 854.

liability of person holding shares in a fictitious name or name of a person who is not liable, 855.

effect of defective transfers and equitable assignments of shares, 856.

liability where corporation refuses to allow a transfer, 856, note.

forfeiture of shares, when a discharge from liability, 857.

transfer of shares, when a discharge from liability, 858.

effect of a transfer upon liability of a shareholder in an English company, 859.

Remedies of creditors to reach assets, or the liability of shareholders to contribute capital, 860-868.

equity of creditor to have ratable distribution in winding up, — set-off, 861, 862.

how a ratable distribution may be secured, 863.

creditors' bills, 864.

rights of execution and attachment creditors after insolvency, 864.

judgment against the corporation is conclusive, 865.

proceedings against shareholders who have not paid up their shares, 866.

powers of receivers and assignees in bankruptcy, 822, 867, 868.

III. Liability of shareholders to creditors under special statutory provisions, 869-905.

general character of the statutory liability, 869 *et seq.*

it arises by contract, 870.

it may be waived by contract, 871.

[THE REFERENCES ARE TO THE SECTIONS.]

CREDITORS OF CORPORATIONS, — *continued.*

it is a contract liability under the Constitution and statutes, 872, 873.

constitutionality of a law discharging shareholders, 814, 816, 872.

liability of shareholders in foreign corporation, 874-877.

the liability not a statutory penalty, 877.

the liability compared with that of partners, 878.

shareholders are not sureties of the corporation, 879.

construction of statutory provision, — the extent of the liability, 880, 881.

for what "debts" shareholders are liable, 880, 881.

shareholders in national banks, 882, 902 note.

judgment and execution against corporation, when a condition precedent, 883, 884.

other conditions precedent to liability, 885, 905.

what is dissolution within meaning of statute, 1012.

effect of judgment against the corporation, 886, 887.

effect of a transfer of shares, 888-891.

liability of past members, 890.

transfer after insolvency does not discharge liability, 891.

statutes authorizing levy on property of shareholders, 892.

proceedings to enforce the special individual liability of shareholders, 893-905.

special remedies prescribed by law, 893.

equities to be considered in enforcing the liability, 894.

when a creditor may sue at law, 895.

remedy in equity concurrent, 896.

when a creditor can insist on a ratable distribution in equity, 897-900.

set-off by shareholders, 898.

when the remedy in equity is exclusive, 899, 900.

joinder of parties, 901-904.

proceedings against shareholders in a foreign corporation, 875, 876, 884, 904.

compliance with conditions precedent must be shown, 905.

IV. *Liability of directors to creditors,*

at common law, 568. See **DIRECTORS.**

for wrongfully diverting capital, 795, 796.

common law liability in tort, 569-574, 835.

statutory liability of directors to creditors, 906-911.

character of the liability, — whether it is penal, 907-909.

remedy for enforcing the statutory liability, 910.

when the directors are entitled to be indemnified, 911.

when they can recover contribution from co-directors, 911.

CREDITORS' BILL,

by creditor of insolvent corporation, 864. See **CREDITORS, II.**

equities of shareholders, 815, 836, 894. See **SHAREHOLDERS, III.**

[THE REFERENCES ARE TO THE SECTIONS.]

CRIMINAL OFFENCE,
liability of corporation for, 732, 733.

CUMULATIVE VOTING,
not impliedly authorized, 476 a.

D.

DAMAGES,
liability of corporation for exemplary, 728, 729.

DARTMOUTH COLLEGE CASE. See LEGISLATIVE CONTROL.

DEAD-LOCK,
in management, remedy of shareholders, 273.

DEATH,
of all the members of a corporation, 1009.
of shareholder, whether statutory liability survives, 877 note.
of director, statutory liability abates, 907.

DEBT,
implied right of corporation to incur, 342, 343.
right to incur where right to borrow is restricted, 344, 345.
liability, when incurred in excess of amount authorized, 600, 601.
See VALIDITY OF CORPORATE ACTS.
for *quantum meruit* where contract void, 714-724.
meaning of term in statutes imposing liability upon shareholders,
880, 881.

DECEIT,
liability for, see FRAUD.
subscriptions obtained by, see SUBSCRIPTIONS FOR SHARES, III.

DECLARATIONS,
of agent, when admissible in evidence, 540 a.

DEED. See PROPERTY.
the authority to execute, 335. See PROPERTY.
validity of, see VALIDITY OF CORPORATE ACTS, III. F.

DE FACTO CORPORATION. See ILLEGAL INCORPORATION.

DE FACTO OFFICER,
meaning of term, 640.
under informal appointment, powers of, 636-640, 543 a.
how removed from office, 543 a.

DEFAMATION. See LIBEL AND SLANDER.

DEFENCES,
to liability for unauthorized corporate acts, see VALIDITY OF CORPORATE ACTS.
to subscriptions for shares, see SUBSCRIPTIONS FOR SHARES; ILLEGAL INCORPORATION.
to suits by creditors, see CREDITORS.

DEFENDANTS. See PARTIES.

[THE REFERENCES ARE TO THE SECTIONS.]

DEFINITION,

of corporation, 1-7, 18, 325, 1091, 1092.
 of foreign and domestic corporation, 958 note, 984.
 of *de facto* corporation, 745, 778.
 of franchises, 922.
 of majority, 476.
 of consolidation, 939.
 of promoters, 545.
 of *de facto* officers, 640.
 of charter, 318.
 of "debts" as used in statutes, 880, 881.

DELEGATION OF POWER,

to charter corporations, 15, 16.
 by agents, 534-536, 64, 145.

DEPOSIT,

by subscriber for shares, 71, 72, 739, 742, 743.

DEVISE,

to corporation, when valid, 331.
 to corporation, laws prohibiting, 671, 1071.
 to foreign corporations, 961, 964, 968.

DIRECTORS. See AGENTS.

who can be, 505.
 must be holders of shares, when, 506.
 need not be residents of State, 361.
 powers of, when not qualified, 507.
de facto but not *de jure*, 150, 543 a, 636-640.
 compensation of, 508, 526.
 powers of, general rule, 510.
 powers of, are derived from the shareholders, 515.
 exclusive powers of, 511.
 discretionary powers cannot be impaired, 243, 244.
 discretion as to distribution of profits, 446, 447, 449.
 cannot make important changes, 512.
 lease or sale of entire property by, 512, 513.
 assignment for benefit of creditors by, 802, 805.
 cannot decide to wind up company, 513.
 powers of, are limited by the charter, 514.
 fiduciary relation to the corporation, 516.
 cannot represent the corporation in transactions in which they have
 personal interests, 517-525.
 cannot use their powers for their own benefit, 517-519.
 cannot purchase property of company, 517, 519.
 when interest in other company disqualifies from dealing, 520, 521.
 nominal interest does not disqualify, 521.
 may deal with corporation if represented by other agents, 521, 527,
 530.
 cannot represent two companies in their mutual dealings, 528-530.

[THE REFERENCES ARE TO THE SECTIONS.]

DIRECTORS, — *continued.*

- may deal with individual shareholders, 565 note.
- can act only as a board, 531. See **MEETINGS**.
- quorum may be fixed by by-law, 492.
- notice of meetings, 531, 532.
- cannot exclude any member of board, 541.
- may hold meetings out of State, 533.
- appointment of subordinate agents, 534-536.
- cannot delegate authority, when, 536.
- appointment of executive committee, 534, 535.
- ratification by, 626.
- resolution of, when parties may rely upon, 611.
- notice to, when binding upon corporation, 540 *b*, 540 *c*.
- notice of company's financial condition, when presumed, 787 note.
- notice of by-laws, 500 *a*.
- corporation has unconditional right to repudiate unauthorized transactions of, 522.
- are agents, not trustees, 523.
- unauthorized dealings of, whether void or voidable, 523, 524.
- remedies of the corporation where directors violate their duties, 525.
- remedy of shareholders where directors refuse to act, 273, 281, 285. See **SHAREHOLDERS**.
- of insolvent corporation, duties to creditors, 737, 738. See **CREDITORS**.
- resignation of, 563, 564.
- removal from office, 541-543.
- de facto* officer, how removed, 543 *a*.
- bankruptcy does not vacate office, 542 note.
- liability to the corporation, 550-562.
- must exercise care and prudence, 551, 552.
- not liable for mistake of judgment, 553.
- must use reasonable skill, 554.
- liability for unauthorized acts, 555.
- liability for violation of statutory prohibitions, 556.
- not liable for excusable mistakes of law, 557.
- advice of counsel, when an excuse, 558, 559.
- not liable for mistake of fact, 560.
- when liable for acts of other agents, 561, 562.
- liability, when joint and when several, 562 note.
- liability to shareholders at common law, 565.
- liability for impairing the value of shares, 566, 567.
- liability to creditors at common law, 568.
- liability to creditors for diverting assets, 795, 796.
- liability to creditors for fraud as to capital stock, 835.
- liability to creditors under statutes, 906-911. See **CREDITORS IV**.
- liability for misapplication of property or trust funds held by corporation, 569.

[THE REFERENCES ARE TO THE SECTIONS.]

DIRECTORS, — *continued.*

liability for fraud and false representations, 570, 835.
right of contribution among, 911.

DISCHARGE OF SHAREHOLDER. See SUBSCRIPTIONS FOR SHARES, IV.

by alteration of articles before incorporation, 62, 68.
by alteration of charter after incorporation, 119, 120.
by transfer of shares, 159, 160.
validity of, as to creditors, 841.
as to creditors who consent, 829, 880, 871.

DISCRETIONARY POWERS,

of agents cannot be impaired, 248.
as to propriety of suing, 244, 248.

DISCRIMINATION,

among shareholders, 87, 279, 802-815.
among creditors, 802-805, 861-864.
by railroad company among shippers, 1117.

DISSOLUTION OF CORPORATIONS. See WINDING UP.

difference between dissolution and loss of franchises, 1002, 1003.
what is within meaning of statute making shareholders individually liable, 885, 1012.
how a corporation may be dissolved, 1004.
by expiration of the charter, 1005.
charters limited upon a contingency, 1006.
effect of loss of corporate organization, 1007, 1008.
effect of death of members, 1009.
insolvency does not operate as, 1010.
by surrender of the charter, 1011.
by legislative enactment, 1013.
constitutionality of legislation effecting, 1048, 1054.
by judicial proceedings, — remedies, 1014, 1030, 1040.
forfeiture of franchises must be adjudicated, 959, 1015.
responsibility of corporation for wrongs of its agents, 1016, 1028.
non-performance of duties a cause for, 1017-1021.
unauthorized exercise of franchises a cause for, 1022.
fraud in obtaining charter a cause for, 1022.
non-performance of conditions subsequent, 1023.
misfeasance a cause for, 1024.
effect of nonfeasance, 1024.
insolvency and suspension of payments when a cause for, 1026, 1027.
what a sufficient cause for dissolution, 1028.
penalty for wrongful act does not prevent, 1027.
waiver by the State of forfeiture, 1029.
method of enforcing forfeiture and dissolution, *quo warranto*, 1030.
court of equity cannot decree, 1040.
consequences of dissolution, 1081-1088.

[THE REFERENCES ARE TO THE SECTIONS.]

DISSOLUTION OF CORPORATIONS, — *continued.*

- consequences at common law, 1081.
- consequences in equity, 1082.
- property of corporation not forfeited by, 1082-1085.
- debts due the company not lost by, 1084.
- creditors cannot prevent, 768.
- rights of creditors after, 1085.
- rights of policy-holder in insurance company, 806 note.
- transfer of shares after, 168.
- winding up after dissolution, 1086, 1087. See **WINDING UP**.
- reorganization and revivor, 1088.

DISTRIBUTION,

- of assets, shareholder when entitled to, 282-285.
- of assets on winding up, see **WINDING UP**.

DISTRICT OF COLUMBIA,

- power of Congress to charter corporations in, 9 note, 984.

DIVIDENDS,

- may be paid only out of profits, 435, 436.
- what constitutes profits, 437-441.
- whether losses must be repaired before paying, 440, 441, 445.
- the rule applicable to mining companies, 442.
- distribution of capital, 443.
- agreements to pay interest to shareholders, 444.
- when irrevocable, 445, 838.
- power of directors to determine whether there are profits, 446.
- discretion of directors as to distribution of profits, 447, 459.
- how are payable, 448, 449.
- the right to make stock dividends, 452, 453.
- of depositors in savings banks, 391.
- delegation of power to declare unauthorized, 536.
- payable to shareholder on stock-books, 170, 449.
- payable without production of certificate, 162.
- payable to holder of shares when declared, 162, 449.
- rights of purchaser or assignee of shares without transfer, 174-178.
- effect of notice to corporation of rights of assignee, 162.
- on preferred shares, to whom payable after sale, 180.
- not payable to party charging corporation with conversion of shares, 217 note.
- set-off by corporation, 201 note.
- remedy of shareholder to recover after declaration, 236, 450, 451.
- remedy of shareholders for wrongful refusal to distribute profits, and declare, 236, 276, 447.
- unfair distribution may be enjoined by shareholder, 279, 305.
- agent refusing, not liable to shareholder, 565.
- rights of holders of preferred shares, see **PREFERRED SHARES**.
- construction of grant or bequest of income and profits, see **GRANT OF INCOME AND PROFITS OF SHARES**.

[THE REFERENCES ARE TO THE SECTIONS.]

- DOMESTIC CORPORATION,**
 meaning of term, 958 note, 984.
- DOMICIL OF CORPORATIONS,**
 meaning of expression, 958, 959 note. See **FOREIGN CORPORATIONS.**
- DONATION,**
 of corporate funds unauthorized, 423, 424.
 of public aid to corporations for public purposes, 1085, 1114.
- DURATION OF CORPORATIONS,**
 time of, 411, 418.
 limitation of, does not affect right to hold property, 330.
 power of legislature to extend, 1060, 1076.
- DUTIES TO THE PUBLIC,**
 resulting from acceptance of public aid, 1114-1136.
 of railroad companies, 1115 *et seq.*
 railroad companies must operate their railroads, 1116.
 railroad companies must carry at reasonable rates without discrimination, 1117.
 obligations of railroad companies to other carriers, 1118.
 what is an excuse for not operating a railroad, 1119.
 whether a railroad company is bound to construct its railroad, 1126-1128.
 duties of telegraph, water, and gas companies, 1129.
 of corporations formed by consolidation, 950.
 remedies to enforce the performance of duties, 1132-1136, 1043.
 penalty of forfeiture and dissolution for neglect of, 1132, 1017-1021.
 constitutionality of legislation for the enforcement of, 1075 *b.*
 discharge of corporation by the legislature from, 400, 1084.
 contracts in violation of duties to the public are illegal, 656, 1120, 1130 note.
 contract of railroad company not to construct its road or stations, 1128 note.
 traffic arrangements among competing lines, 1130, 1131.
 property necessary to operation of a railroad cannot be sold, leased, or mortgaged, 1120.
 property not necessary to operation of the road may be disposed of, 1121.
 sales, leases, or mortgages of railroad property, when expressly authorized, 1122-1124.
 when railroad property cannot be taken under an execution, 1125.

E.

- ECCLESIASTICAL CORPORATION.** See **RELIGIOUS CORPORATION.**
- ELECTIONS.** See **MEETINGS OF SHAREHOLDERS.**
 of disqualified candidate, 485.
 remedy where irregular, 543 *a.*
 powers of inspectors of, 484.

[THE REFERENCES ARE TO THE SECTIONS.]

ELEEMOSYNARY CORPORATION. See CHARITABLE CORPORATION.

EMINENT DOMAIN,

the power of, 1086-1090, 1114.
cannot be bargained away, 1090.
conditions of exercise of power, 1087.
construction of grant of power, 823.
only corporation *de jure* entitled to power of, 768.
extent of power belonging to railroad companies, 869, 870.
transfer or mortgage of power of, 984. See FRANCHISES.

EQUITY. See REMEDIES; SPECIFIC PERFORMANCE.

rights and remedies of shareholders in, see SHAREHOLDERS, II., III.
rights and remedies of creditors in, see CREDITORS.
corporation how regarded in, 227.
transfer of shares when decreed in, 214, 216-221.
right of equitable owners of shares, 219-221.
jurisdiction in equity over corporations, 1039-1043.
forfeiture of franchises cannot be decreed in, 1040.
unauthorized exercise of franchises cannot be restrained by court of, 1041.
will interfere where equitable grounds of relief exist, 1042.
when the government can proceed against a corporation in equity, 1043.
consequences of dissolution in, 1082.

ERASURE,

of subscription for shares, 77, note.

ESCROW,

subscription for shares given to commissioners, 69.
rights of creditors where subscription held in, 851.

ESTOPPEL,

from denying authority of agents, 586 *et seq.* See VALIDITY OF CORPORATE ACTS, I. B.
of corporation by reason of acquiescence or laches of shareholders, 628-632.
of corporation against assignee of unauthorized obligation, 604.
from denying illegality of act in excess of charter, 692.
from denying legality of corporate existence, 750, 774, 778 note.
See ILLEGAL INCORPORATION.
from denying validity of increase of capital stock, 761-767.

EVIDENCE. See PROOF.

EXAMINATION,

of books of corporation by shareholders, 478.

EXCESS,

of subscription over amount authorized, 58.
issue of shares in excess of charter, 761-766.
of charter, by corporation, see VALIDITY OF CORPORATE ACTS.

[THE REFERENCES ARE TO THE SECTIONS.]

EXECUTED CONTRACTS,

when binding upon corporation, see **VALIDITY OF CORPORATE ACTS, III. E.**

EXECUTION, PROCESS OF,

franchises cannot be taken under, 924 note.
against property of railroad companies, 1125.
against property of insolvent corporation, 864.

EXECUTORS AND ADMINISTRATORS,

whether corporations can be, 857, 961 note.
shares held by, notice of will, 182.
entitled to vote on shares, 483.
holding shares, liable to creditors, 854.

EXEMPLARY DAMAGES,

liability of corporation for, 728, 729.

EXEMPTION,

from future legislation not implied, 1062.
from taxation not implied, 1055.
from taxation when revocable, 1053, 1055.
from taxation, transfer or mortgage of, 935.
from taxation when a franchise of consolidated company, 947, 948.

EXISTENCE OF CORPORATIONS,

time of duration, 411, 418. See **DURATION.**
dissolution of, see **DISSOLUTION; WINDING UP.**

EXPIRATION OF CHARTER,

effect of, 1002, 1004. See **DISSOLUTION; WINDING UP.**

EXPRESS COMPANIES,

rights against railroad companies, 1118.

EXPULSION,

of members of society, by-law providing for, 493.
unauthorized, remedy of member, 277.

F.

FAILURE. See INSOLVENT CORPORATION.

of purposes of corporation, remedy of shareholder, 282-285.
of corporation within meaning of statute, 885.

FALSE IMPRISONMENT,

liability of corporation for, 727.

FALSE REPRESENTATIONS. See FRAUD.

liability of corporation for, see **FRAUD.**

in obtaining subscriptions, see **SUBSCRIPTIONS FOR SHARES, III.**

FEDERAL COURTS. See UNITED STATES COURTS.

FEE,

grant of, to corporation, 330.

[THE REFERENCES ARE TO THE SECTIONS.]

FICTION,

of corporate entity, its uses, 1, 227, 232.

FICTITIOUS SUBSCRIPTIONS,

validity of, as to other subscribers, 303.

validity of, as to creditors, 855.

when a ground for avoiding subscriptions, 107.

when conditions as to subscription of capital satisfied by, 141.

FIDUCIARY POSITION,of directors, see **DIRECTORS**.**FOREIGN CORPORATIONS,****I. Meaning of term, 958 note.**

"residence" or "dwelling" of, 958 note, 959.

power of agents to act and contract, 359-361, 533, 958.

franchises not operative out of the State granting them, 959.

rights extended to foreign corporations by law of comity, 960, 961.

the law of comity is part of the common law, 962.

departure from charter not authorized, 963.

comity refused when contrary to policy of the State, 965.

repeal of comity not implied, 966.

the charter alone recognized by comity, 967.

effect of statutes of State which granted charter, 967, 968.

are subject to laws of State where acts are done, 964, 968.

validity of devises to, 961, 964, 968.

effect of statutes prescribing conditions precedent to right of doing business, 661-665. See **VALIDITY OF CORPORATE ACTS, III.**

only the franchise of acting in a corporate capacity extended by comity, 969.

foreign joint-stock companies recognized by comity, 989, 990.

methods of winding up recognized by comity, 988.

law of comity may be repealed, and foreign corporations excluded, 970, 971.

constitutional rights of, 970-974 *a*.State laws interfering with commerce invalid as to, 974, 974 *a*.rights of telegraph companies, 974 *a*.

charter of, cannot be altered by law, 1059.

law extending duration for purpose of winding up, 1076.

citizenship with regard to jurisdiction of Federal courts, 975. See

UNITED STATES CIRCUIT COURTS.

validity of stipulation not to remove suit, 971.

may be sued, if jurisdiction obtained, 976, 977.

validity of judgments against, 976, 978.

how jurisdiction can be obtained over, 977, 979-983.

service of process upon, 979-983.

may be required to appoint agents to receive, 971.

statutes regulating service of process on, 979, 982.

suits in New York against, 983.

[THE REFERENCES ARE TO THE SECTIONS.]

FOREIGN CORPORATIONS, — *continued.*

jurisdiction in suits against corporations chartered by Congress, 985-987.

suits against national banks, 987.

cannot be dissolved out of State granting charter, 959.

liability of shareholders in, when enforceable, 874-876, 884, 904.

liability of directors of, when enforceable, 907, 908.

charter of, how proven, 89.

party dealing with, must take notice of charter, 591, 592.

purchaser of shares must take notice of lien, 203 note.

transfer of shares in, formalities, 169.

liability of unauthorized contracts of, when executed, 696.

validity of dealings of, when irregularly formed, 756.

II. *Corporations chartered by several States,*

reincorporation of associations incorporated in other States, 991.

statutory license distinguished from re-incorporation, 991-993, 999 *a.*

character and legal status of, 994-999.

construction of the charter of, 997.

citizenship with regard to jurisdiction of Circuit Courts, 999, 1001.

consolidation under laws of different States, 1000, 1001.

FOREIGN STATE,

power of corporations to act in, 958. See **FOREIGN CORPORATIONS.**

whether meeting can be held in, 488, 533.

FORFEITURE OF FRANCHISES OR CHARTER. See DISSOLUTION.

acts threatening may be restrained, 273.

can be declared only by State granting, 959.

how enforced, 938, 1030.

FORFEITURE OF GRANT,

of public aid to a corporation, 1132.

FORFEITURE OF SHARES,

when the power of declaring forfeiture exists, 122.

by-law providing for, invalid, 499.

construction of provisions conferring the power, 123.

remedy by forfeiture is cumulative, 124, 128, 132.

effect of forfeiture on liability of shareholder, 124, 125.

forfeiture usually not complete until sale, 126.

the right of redemption, 126, 127.

power to declare cannot be delegated, 536.

remedy of shareholder when improperly declared, 277, 278.

discharges liability to creditors, 857.

unauthorized when corporation insolvent, 309, 857.

FORGERY,

transfer of shares under forged power, 208-210 *a.*

FORMALITIES,

of forming corporations, see **FORMATION OF CORPORATIONS.**

[THE REFERENCES ARE TO THE SECTIONS.]

FORMALITIES, — continued.

effect of failure to observe, see **ILLEGAL INCORPORATION**.
 of subscriptions for shares, 65, 67-69. See **SUBSCRIPTIONS FOR SHARES**; **ILLEGAL INCORPORATION**.
 of increasing capital stock, failure to observe, 761-767.
 of conducting meetings of shareholders, 487. See **MEETINGS OF SHAREHOLDERS**.
 of transferring shares, 169 *et seq.* See **TRANSFER OF SHARES**.
 appointment of agents, 636-640.
 of corporate acts, construction of provisions prescribing, 321, 335.
 effect of non-observance by agents, 582-584.
 when party dealing with agent may assume compliance with, 610, 611.
 managing agents cannot assume compliance with, 584 note.
 ratification of informal acts, 626, 634, 635. See **RATIFICATION**.
 validity of informal acts and contracts, see **VALIDITY OF CORPORATE ACTS**.

FORMATION OF CORPORATIONS,

validity of, when not authorized by law, see **ILLEGAL INCORPORATION**.
 character of franchise authorizing, 923.
 only legislature can authorize, 8.
 power of Congress to authorize, 9.
 constitutional limitations upon power of legislature to authorize, 10-14.
 delegation of power to authorize, 15-17.
 what operates as a grant of corporate franchises, 18, 19.
 use of word "incorporate" not necessary, 18.
 ratification of, by legislature, 20.
 acceptance of charter, 21-23.
 necessity of an agreement among incorporators, 24, 736.
 how agreement among incorporators formed, 25. See **CONTRACT OF MEMBERSHIP**; **SUBSCRIPTIONS FOR SHARES**.
 conditions precedent to, 26-32.
 what necessary under general incorporation law, 27.
 subsequent failure to comply with law, or violation of charter, does not invalidate, 31.
 substantial compliance with conditions sufficient, 32.
 not illegal because articles contain unauthorized provisions, 32.
 who constitute corporation, 33, 34.
 the necessity of shareholders, 33.
 who can form a corporation, 26, 35.
 transfer of franchises, 924, 936, 937.
 proof of, see **PROOF**.

FRANCHISE,

meaning of the term, 922.
 of forming a corporation, 923.

[THE REFERENCES ARE TO THE SECTIONS.]

FRANCHISE, — continued.

- of forming a corporation, how acquired, 8, 18, 20. See **FORMATION OF CORPORATIONS.**
- special franchise, construction of grant of, 923.
- of foreign corporations, see **FOREIGN CORPORATIONS, I.**
- of corporation chartered by several States, 994-997.
- of corporation formed by consolidation, see **CONSOLIDATION.**
- grant of, when a contract, 1050, 1053.
- revocable unless secured by contract with State, see **LEGISLATIVE CONTROL.**
- reserved power to repeal or alter, see **LEGISLATIVE CONTROL, II.**
- may be taken under power of eminent domain, 1088.
- what a "transfer" or "mortgage" of franchises means, 924, 925, 927, 928.
- the right of transferring or mortgaging franchises, 926.
- nature of the transfer of a "charter," or "the franchise to be a corporation," 928.
- the "value" of franchises defined, 929.
- power to transfer or mortgage franchises, when not implied, 930, 931.
- franchises cannot be taken under execution, 924 note.
- franchise necessary to the use of property impliedly transferable with the property, 932, 933.
- construction of grant of express authority to transfer or mortgage "franchises and property," 934-937.
- such grant does not include an exemption from taxation, 935.
- power to transfer or mortgage the franchise of forming a corporation, 936, 937.
- revocation by legislature of authority to transfer or mortgage, 1082.
- remedy for usurpation or forfeiture of, 938, 1030. See **DISSOLUTION.**
- effect of forfeiture, 768, 959, 1015.
- court of equity cannot restrain excess of, 1040, 1041.
- cannot be annulled in foreign State, 959.
- loss of, distinguished from dissolution, 1002, 1003.

FRAUD,

- in obtaining charter or franchises, 769, 1022.
- in obtaining subscriptions for shares, see **SUBSCRIPTIONS FOR SHARES, III.**
- liability to creditors of shareholders whose subscriptions were obtained by, 839, 840.
- liability of corporation for, 605, 727.
- liability of agents for, 570-574.
- of promoters, remedies, 291-293, 546.
- by corporation, how far interests of shareholders regarded, 231.
- upon creditors as to capital stock, see **CREDITORS.**

[THE REFERENCES ARE TO THE SECTIONS.]

G.

GARNISHEE PROCEEDING,

to reach liability of shareholders, 819, 864.

GAS COMPANY,

duties of, to the public, 1114, 1129.

regulation of charges of, 1075 b.

grant of monopoly to, 1057.

nature of right to lay pipes in street, 988.

GENERAL INCORPORATION LAW. See FORMATION OF CORPORATIONS; SUBSCRIPTIONS FOR SHARES.construction of, see **CONSTRUCTION OF CHARTERS.****GIFT,**

of corporate funds, 423, 424.

of shares to corporation, 114.

of certificate for shares, 226.

GRANT. See PROPERTY.of charter, see **FORMATION OF A CORPORATION.**

of special franchises, construction, 323.

of franchises when a contract, see **LEGISLATIVE CONTROL.**

to corporation, construction of, 330.

GRANT OF "INCOME AND PROFITS" OF SHARES.

does not include undivided earnings, 465.

includes all ordinary dividends, 466.

who entitled to unusual dividends of accumulated earnings, 467.

who entitled to stock dividends, 468-471.

GRATUITY. See GIFT.**GUARANTY,**

by corporation, when authorized, 350, 394, 423.

by corporation, of dividends, 456-458. See **PREFERRED SHARES.**

liability of shareholders not that of guarantors, 879.

GUARANTEED SHARES, see PREFERRED SHARES.**GUARDIAN,**

holding shares, statute discharging from liability, 854.

H.

HOTEL COMPANY,

letting part of premises, 367.

I.

ILLEGAL ACTS AND CONTRACTS,acts prohibited by statute or common law, see **VALIDITY OF CORPORATE ACTS, III. A.**

[THE REFERENCES ARE TO THE SECTIONS.]

ILLEGAL ACTS AND CONTRACTS, — continued.

unauthorized corporate acts, see **VALIDITY OF CORPORATE ACTS**, III.

illegality cured by subsequent assent of State, 651.

when value received under illegal contracts must be accounted for, 714-724.

ILLEGAL INCORPORATION,

legal consequences of the formation of a corporation without authority of law, 735-778.

does not result in partnership, 748.

validity of incorporation as among shareholders, 735-743.

necessity of contract of shareholders and the consent of the State, 736.

subsequent consent of State cures illegality, 20, 651.

effect of non-compliance with conditions precedent prescribed by law, 737-739.

when a subscriber is bound, though formalities have not been complied with, 741-743.

validity of an unauthorized increase of capital stock, 761-767.

validity of contracts and dealings of corporations formed without authority of law, 944-760.

corporations *de facto* and *de jure*, 744-746.

the existence of a corporation *de facto* essential, 746.

application of the law of agency to corporations *de facto*, 747.

shareholders in an illegally formed corporation not liable as partners, 748, 749.

liability of shareholders in a *de facto* corporation to creditors, 755.

executed contracts of a corporation *de facto*, 750-752.

transfers of property by or to a corporation *de facto*, 753, 754.

validity of dealings of foreign corporations *de facto*, 756.

corporations formed by irregular consolidation, 757.

corporations formed for illegal or immoral purposes, 14, 32, 758, 759.

corporations formed pursuant to unconstitutional laws, 759, 760.

corporations *de facto* have no special powers, — the power of eminent domain, 768.

validity of corporate acts performed under a charter obtained by fraud, 769.

proof of existence of corporation, when necessary, 770.

misnomer of an existing corporation, 771.

when the existence of corporation is put in issue by the pleadings, 772.

how existence of corporation defendant can be denied, 773.

proof of existence of corporation by admission of the opposing party, 774.

presumption of continuance of corporate existence, 775. See also **PROOF**.

IMMORAL AGREEMENTS,

not enforceable, 721-724.

[THE REFERENCES ARE TO THE SECTIONS.]

- INCOME.** See **DIVIDENDS.**
construction of grant of, see **GRANT OF INCOME AND PROFITS.**
- INCORPORATION,**
how legally effected, see **FORMATION OF CORPORATIONS.**
validity of, when irregular, see **ILLEGAL INCORPORATION.**
- INCORPORATION LAWS,**
enactment of, see **FORMATION OF CORPORATIONS.**
construction of, see **CONSTRUCTION OF CHARTERS.**
proof of, 38, 39.
- INCREASE OF CAPITAL STOCK,**
not impliedly authorized, 434.
who can effect, when authorized by charter, 512.
validity of, when in excess of charter, 761-767.
rights of existing shareholders upon, 454, 455.
rights of creditors, 833.
subscription of entire amount not a condition to liability of shareholders, 142.
- INDEMNITY,**
when shareholder on books entitled to, from purchaser, 175, 856
note.
- INDICTMENT,**
corporation when liable to, 732, 733.
- INDIVIDUAL LIABILITY OF SHAREHOLDERS,**
to the corporation, see **LIABILITY OF SHAREHOLDERS.**
to creditors, see **CREDITORS.**
- INDORSEMENT.** See **NEGOTIABLE INSTRUMENT.**
of corporation, when authorized, 350, 423, 394.
unauthorized, when binding, see **VALIDITY OF CORPORATE ACTS.**
of certificate for shares, see **CERTIFICATE FOR SHARES.**
- INFANT,**
liability for shares held in name of, 855.
- INFORMALITY.** See **FORMALITIES.**
- INFORMATION,**
in the nature of a *quo warranto*, 1030.
in equity, by attorney-general, 1041, 1043.
- INJUNCTION.** See **REMEDIES.**
when shareholder entitled to, against directors, 250, 253. See
SHAREHOLDERS, II.
when creditor can restrain diversion of assets, 797-799.
when attorney-general can restrain unauthorized corporate acts,
1041, 1043.
- INSOLVENT CORPORATION,**
not dissolved without judgment, 1010.
may be dissolved, when, 1026, 1027.
shareholders entitled to winding up, 412.
rights of shareholders in winding up, see **WINDING UP.**

[THE REFERENCES ARE TO THE SECTIONS.]

- INSOLVENT CORPORATION**, — *continued*.
 shareholders not discharged from liability, 151.
 shares in, cannot be forfeited, 309, 857.
 transfer of shares in, not authorized, 166, 167, 310, 858.
 duties of officers of, 787, 788.
 rights of creditors in, 786-790. See **CREDITORS**.
- INSPECTION OF BOOKS**,
 of corporation, right of shareholders, 493.
- INSPECTORS**,
 at elections, powers and appointment of, 484.
- INSURANCE**,
 by shareholder, of interest in corporation, 231 note.
- INSURANCE COMPANY**,
 may pay claim for which it is not liable, 424.
 life or fire company cannot take marine risk, 398.
 purchase of business of other company, 420.
 statutes regulating foreign companies, 661-665.
 policy-holder may restrain diversion of assets, when, 797-799.
 policy-holder not bound to accept other obligation, 808.
 liability for loss happening after dissolution, 808 note.
- INTERFERENCE WITH CORPORATE AFFAIRS**,
 by shareholders' bill, see **SHAREHOLDERS**, II.
 by creditors, see **CREDITORS**, I.
- INTEREST**,
 usurious, see **USURY**.
 on contributions of shareholders, 444.
 on shares, guaranty of, 457, 458. See **PREFERRED SHARES**.
- INTERNAL AFFAIRS OF CORPORATIONS**,
 provisions for regulation of, effect of non-observance, 674-677.
 when compliance with formalities may be presumed, 610, 611.
 interference with, not authorized, 243, 281.
- INTERPRETATION**,
 of charters, see **CONSTRUCTION OF CHARTERS**.
- INVESTMENT**,
 of funds of corporation, 822. See **CONSTRUCTION OF CHARTERS**.
 of surplus funds, 367.
- IRREGULARITY**,
 of incorporation, see **ILLEGAL INCORPORATION**.
 of creation of shares, see **SUBSCRIPTIONS FOR SHARES ; ILLEGAL INCORPORATION**.
 of corporate acts, see **FORMALITIES ; VALIDITY OF CORPORATE ACTS**.
- ISSUE OF SHARES**. See **CERTIFICATES FOR SHARES ; SUBSCRIPTIONS FOR SHARES**.
 distinguished from issue of certificates, 286-290.
 in excess of charter, 761-767.

[THE REFERENCES ARE TO THE SECTIONS.]

ISSUE OF SHARES, — *continued.*

- as paid for less than par unauthorized, 425-429.
- as paid up, equities of shareholders, 806, 286-290.
- as paid up, equities of creditors, 824 *et seq.*
- for less than value, causes of action resulting, 286-290.

J.**JOINDER OF PARTIES.** See **PARTIES.****JOINT LIABILITY,**

- of directors, 562 note, 911 note.

JOINT OWNERS,

- of shares, who entitled to vote, 488.

JOINT-STOCK COMPANIES,

- are quasi corporations, 6.
- recognized by comity in foreign States, 989, 990.
- suits against members in foreign States, 876, 989, 990.
- party dealing with must take notice of articles, but not of by-laws, 595.
- right of creditors to restrain waste of assets, 798.
- transfer of shares in, at common law, 163.

JUDGMENT,

- against dissolved corporation, void, 1031.
- against foreign corporation, when valid, 976, 978.
- against corporation, when conclusive in proceeding against shareholders, 865, 886, 887.

JUDICIAL NOTICE. See **NOTICE.**

- of charters, 38, 39.
- of the powers of agents, 509.
- of the banking business, 882.

JURISDICTION,

- in equity over corporations, 1039-1043.
- of United States Courts. See **UNITED STATES COURTS.**
- in suits against foreign corporations, 976-983. See **FOREIGN CORPORATIONS.**
- in suits of shareholders, see **SHAREHOLDERS, II.**

K.**KNOWLEDGE,**

- of agent affects corporation, when, 540 *b*, 540 *c*.

[THE REFERENCES ARE TO THE SECTIONS.]

L.

LACHES,

- of shareholders operating as estoppel against corporation, 628-632.
- of party having claims against corporation, 231.
- of shareholder, when a bar to relief, 262, 263.
- bars right to avoid subscription obtained by fraud, 103.

LAND. See PROPERTY.

- implied power to acquire, 327, 330.
- power to take by devise, 331.
- acquisition of, by railroad companies, 369, 370.
- may be acquired by corporation in foreign State, 360, 361.

LAWS. See STATUTES.

- of incorporation; see FORMATION OF CORPORATIONS.
- affecting the validity of corporate acts, see VALIDITY OF CORPORATE ACTS, III. A.
- affecting foreign corporations, see FOREIGN CORPORATIONS.
- constitutionality of, see LEGISLATIVE CONTROL.
- construction of, see CONSTRUCTION OF CHARTER.

LEASE,

- of surplus property, 367.
- of railroad, 1120-1124.
- by railroad of use of its tracks, 379.
- of entire property of company, 416, 417, 512 note.

LEGAL PROCEEDINGS. See REMEDIES; PLEADING AND PRACTICE.

- right of corporation to sue and be sued, 356.
- when corporate funds may be used to support, 430.

LEGALITY,

- of corporate acts, see VALIDITY OF CORPORATE ACTS, III.
- of acts of foreign corporation, see FOREIGN CORPORATIONS.
- of formation of corporations, see FORMATION OF CORPORATIONS; ILLEGAL INCORPORATION.

LEGISLATIVE CONTROL OVER CORPORATIONS.

I. *Legislative powers,*

- constitutional prohibitions, 1044.
- the Dartmouth College case, 1045.
- in what respect the charter embodies a contract, 1046.
- the contract among the shareholders cannot be impaired, 1047, 1048, 1059, 1060.
- alteration of the purposes of a corporation, 1047, 1059.
- charitable trusts cannot be impaired, 1049.
- legislature cannot create a corporation without consent of shareholders, 736.
- laws prolonging existence of corporations, 1037, 1038, 1076.
- contracts between the State and the corporators, 1050.
- dissolution of corporations by law, 1013, 1048, 1054.

[THE REFERENCES ARE TO THE SECTIONS.]

LEGISLATIVE CONTROL OVER CORPORATIONS, — *continued*.

- franchises, when contract rights, 1050, 1053.
 - power of the legislature to bind the State by contract, 1051, 1052.
 - police powers cannot be bargained away, 1052.
 - necessity of a consideration for an irrevocable grant of franchises, 1053.
 - effect of revocation of franchise by State, 1053.
 - irrevocable grants of franchises, 1055-1058.
 - grants of monopolies or exclusive rights, 1057, 1057 *a*.
 - exemption from future legislation not implied, 1062.
 - what laws are constitutional, general rules, 1063 note, 1064 *et seq*.
 - general laws for the welfare of the community, 1065, 1070, 1071.
 - laws regulating particular classes of business, 1066.
 - laws for the protection of life and property, 1067.
 - laws prohibiting nuisances, 1068.
 - laws prohibiting the sale of spirituous liquors, 1069.
 - laws regulating banking, 1072, 1077.
 - laws regulating railroads, 1067, 1073, 1099.
 - laws affecting foreign railroad companies, 970-974.
 - laws regulating charges, 1074-1075 *d*.
 - laws regulating charges of railroad companies, 1075-1075 *d*.
 - laws affecting telegraph companies, 974 *a*.
 - laws providing new remedies, 1076; 1077, 1080, 1081.
 - laws increasing or discharging liability of shareholders, 815, 816, 872, 1078, 1099, 877 note.
 - limitation law constitutional, 814, 1080.
 - special legislation affecting contracts, 1079, 1080.
 - special legislation for the advancement of justice, 1080.
 - laws incorporated in charter may be repealed, 1081, 1082.
 - law repealing right of municipality to subscribe for shares, 1081.
 - law repealing right to transfer franchises, 1082.
 - law conferring new rights or franchises, 399, 1088.
 - law discharging a corporation from duties, 1084.
 - constitutionality of taxation, 1085.
 - the power of eminent domain, 1086-1090.
 - commerce cannot be interfered with, 974, 1075 *d*.
 - what statutes apply to corporations, 1061, 1091, 1092.
 - laws regulating foreign corporations, 970-974 *a*. See FOREIGN CORPORATIONS.
 - rights of creditors cannot be impaired, 814-817, 872, 877 note.
 - See CREDITORS.
- II. *Reservation by the State of power to alter or repeal a charter,*
- purpose of the reservation, 1093, 1097.
 - negatives contract not to repeal franchises, 1094.
 - gives State limited control over corporate affairs, 1095.
 - extent of the power of alteration, 1096-1100.
 - collateral contracts cannot be impaired, 1101, 1102.

[THE REFERENCES ARE TO THE SECTIONS.]

LEGISLATIVE CONTROL OVER CORPORATIONS, — *continued.*

creditors how far bound by, 817.
 how far vested rights may be affected, 1103, 1104.
 regulations for future government valid, 1005.
 reservation of power of repeal or alteration, by constitution, or by
 general law, 1006.
 effect of reservation by general act of the legislature, 1007, 1009.
 what amounts to a reservation of power, 1008.
 when company formed by consolidation is subject to the reserved
 power, 944, 945, 1109.
 what operates as a repeal or alteration, 1110.
 effect of an offer of alteration of the charter, 405, 1111.
 when the power of, is unconditional, 1112, 1113.
 the power of alteration not confined to a single occasion, 1112.

LEGISLATURE,

power of, to charter corporations, see **FORMATION OF CORPORATIONS.**
 powers of, see **LEGISLATIVE CONTROL.**
 applications to, 298-301.

LEVY OF EXECUTION,

on property of shareholders for corporate debt, under statutes, 892.
 on property of a railroad company, 1125.

LIABILITY.

of shareholders, see **LIABILITY OF SHAREHOLDERS.**
 of directors, see **DIRECTORS.**
 of corporation, for acts of agents, see **VALIDITY OF CORPORATE ACTS, I.**
 of corporation for acts in excess of its charter, see **VALIDITY OF CORPORATE ACTS.**
 to account for value received under void agreements, 526, 703, 714-724.

LIABILITY OF SHAREHOLDERS,

to contribute capital for benefit of creditors, see **CREDITORS, I., II.**
 under statutes, to creditors, see **CREDITORS, III.**
 in illegally formed corporations, see **ILLEGAL INCORPORATION.**
Liability for calls, 128-158.
 when the liability exists, its character, 128.
 power of forfeiture does not negative, 124, 128.
 the rule in Maine, Massachusetts, and New Hampshire, 129, 132.
 where no capital has been agreed on, 130.
 after shares have been paid up, 131, 496.
 power of legislature to increase, 1078, 1099.
 where there is an express agreement to pay, 132.
 consideration of the assumption of liability, 133.
 contract to purchase shares, consideration necessary, 134.
 insolvency of corporation does not discharge, 151.
 abandonment of enterprise, effect of, 151-153.
 misapplication of funds does not discharge, 151.
 where capital no longer needed, 152.

[THE REFERENCES ARE TO THE SECTIONS.]

LIABILITY OF SHAREHOLDERS, — *continued.*

- distinction between rescission of contract and cessation of liability, 153.
- liability of subscribers several, 158.
- discharge by transfer of shares, *see* TRANSFER OF SHARES.
- discharge by forfeiture of shares, 124, 125.
- release by the corporation, 302, 305.
- corporation may receive money or money's worth in payment of, 425-429.
- ratable contribution required, 305.
- of insolvent corporation, equity of contribution, 811-815, *see* SHAREHOLDERS, III.
- of sole shareholder, 232.
- where shares are held in trust, 304, 850-854.
- where shares are issued in trust by the corporation, 850, 851.
- when statute of limitations runs, 822 note.
- Conditions of liability*, — complete incorporation necessary, 135.
- conditions expressly prescribed by charter, 136.
- subscription of capital agreed upon an implied condition, 137, 740.
- when amount of capital must be fixed, 138.
- capital required for preliminary expenses, 139.
- where corporation authorized to begin business with part of capital, 140.
- capital must be subscribed unconditionally and in good faith, 141, 78, 81.
- where capital increased, entire amount need not be subscribed, 142.
- tender of certificate, not a condition, 61, 148.
- agreements to pay unconditionally, 149.
- waiver* of conditions precedent, 156.
- liability unconditional as to creditors, 821-823.
- conditions imposed by terms of subscription, *see* SUBSCRIPTIONS FOR SHARES, II.
- Calls*, — the necessity of, 143.
- call not necessary where time of payment fixed, 144, 149.
- who can make calls, 145.
- power to make calls cannot be delegated, 145.
- amount and time of calls, 146.
- notice of calls, 147, 154.
- discretion of directors as to amount of calls, 150, 151, 243.
- unauthorized calls, liability to pay, 150-155.
- calls must be fair to all shareholders, 154-305.
- unauthorized calls cannot be ratified by corporation, 155.
- waiver* of calls, 157.
- proceedings to recover calls, proofs, 158.

LIBEL AND SLANDER,

- liability of corporation for, 727.
- corporation may recover damages for, 353.

[THE REFERENCES ARE TO THE SECTIONS.]

LICENSE,

granted to foreign corporation, effect of, 991-993. See FOREIGN CORPORATION.

LIEN ON SHARES,

when corporation has, 201.
character and extent of, 204, 205.
where debt improperly created, 206.
waiver of, 207.
when purchasers must take notice of, 203.
effect of assignment without transfer, 171, 206.
national bank cannot reserve, 474, 201 note.

LIFE TENANT,

of shares, rights of, see GRANT OF INCOME AND PROFITS OF SHARES.

LIMITATION,

of duration of corporations, see DURATION OF CORPORATIONS.
of actions, see STATUTES.

LIMITED COMPANY,

equities among shareholders in winding up, 813.
rights of creditors of, 798, 833, note.

LIQUIDATION. See WINDING UP.

LIQUOR LAWS,

constitutionality of, 1069.

LIS PENDENS,

no application to certificates for shares, 190.

LOAN. See BORROWING MONEY.

when authorized, see CONSTRUCTION OF CHARTERS.
validity of, when unauthorized, see VALIDITY OF CORPORATE ACTS.
by national bank, see NATIONAL BANK.

LOCAL LAW,

when an act of incorporation is not, 13.
by-law of municipality is, 491, 598.

LOCATION OF RAILROAD. See RAILROAD COMPANIES.

LOSS,

of certificate for shares, 188.
of capital, rights of creditors, see CREDITORS.

LOTTERY,

franchise to hold, construction of, 323.
law prohibiting, within police powers, 1052.

M.

MAJORITY OF SHAREHOLDERS. See MEETINGS OF SHAREHOLDERS.

meaning of term, 476.
relation of the corporation, 641.
powers of, generally, 474, 475, 641-647.

[THE REFERENCES ARE TO THE SECTIONS.]

MAJORITY OF SHAREHOLDERS, — *continued.*

- power of winding up the company's business, 413, 414, 417.
- cannot assent to alteration, 645.
- cannot assent to consolidation, 646.
- may assent to changes authorized by charter, 407.
- powers where right to alter charter reserved, 404-406.
- must act in good faith, 477, 529.
- power of making by-laws, see **BY-LAWS**.
- discretionary powers cannot be impaired, 243.
- cannot impair powers of directors, 511.
- ratification by the majority, 249, 490, 622, 626. See **RATIFICATION**.
- acts of in excess of charter, when not binding, 641-647. See **VALIDITY OF CORPORATE ACTS, II**.
- right of shareholders to relief against wrongful acts of, 249, 252, 262.
- See **REMEDIES OF SHAREHOLDERS, II**.

MALICE,

- when imputed to a corporation, 725-734.

MALICIOUS PROSECUTION,

- liability of corporation for, 727.

MANAGEMENT OF CORPORATIONS,

- how business should be managed, see **CONSTRUCTION OF CHARTERS**.
- powers of agents, see **AGENTS**.
- powers of the majority, see **MAJORITY**.
- of meetings, see **MEETINGS**.
- unnecessary interference with by courts not justifiable, 243, 281.
- formalities of, see **FORMALITIES**.

MANDAMUS,

- to compel officer to file certificate of incorporation, 15.
- to compel directors to call a meeting, 273.
- to compel transfer of shares, 215.
- to enforce payment of dividends, 451.
- to enforce performance of duties to the public, 1132-1136.

MANUFACTURING CORPORATION,

- may buy patent right, 365.
- purchase of stock of goods by, 367 *a*.
- taxation in aid of, unconstitutional, 1085, 1114.
- Under laws of New York,*
- how constituted, 83.
- when entitled to begin business, 140.
- what may be received in payment of shares, 429.
- right to mortgage, 343, 478.

MEETINGS OF DIRECTORS. See also MEETINGS OF SHAREHOLDERS.

- why necessary, 531, 532.
- what a quorum, 531.
- presence of president not necessary, 531.
- notice necessary, 531, 532.
- may be held out of State, 533.

[THE REFERENCES ARE TO THE SECTIONS.]

MEETINGS OF SHAREHOLDERS,

- powers of the majority, 474, 475, 641-647.
- meaning of the term "majority," 476.
- number of votes of each shareholder, 476 a.
- personal interest or contract of shareholder does not disqualify from voting, 477.
- effect of combination among shareholders, 477.
- shares owned by the corporation cannot be voted upon, 478.
- notice of meeting, when necessary, 479.
- presumption in favor of regularity of, 487, 479 note.
- what notice is required, 481.
- waiver of notice, 490.
- who can call a meeting, 480.
- regular and special meetings, 482.
- who entitled to vote, 483.
- inspectors of election, powers and appointment of, 484.
- effect of votes cast illegally or for disqualified candidates, 485.
- voting by proxy, 486.
- formalities in conducting, 487.
- time and place of holding meetings, 481, 488.
- adjourned meetings, 489.
- irregular meetings may be ratified, 490.
- by-law regulating, valid, 492.
- remedy of shareholders where directors refuse to call, 273.
- directors may be enjoined from preventing, 543 a, note.

MEMBERS. See **SHAREHOLDERS.**

MERGER OF CORPORATIONS. See **CONSOLIDATION.**

meaning of term, 939 note, 942, 945.

MINING COMPANIES,

- may borrow money, 344 note.
- purchase of steamboat by, 387.
- issue of negotiable note by, 350-352.
- power of managing agent of, 509.
- what may be distributed as dividends, 442.
- liability of shareholders to creditors, 830.

MINORITY,

rights of, see **SHAREHOLDERS, II.**

MISAPPLICATION OF CORPORATE FUNDS,

- majority cannot ratify, 249, 622.
- ratification of, by the shareholders, 625.
- remedy of shareholders, 274. See **SHAREHOLDERS, II.**

MISNOMER,

- of corporation, effect of, 354, 355.
- of corporation distinguished from designation of non-existing company, 770, 771.

[THE REFERENCES ARE TO THE SECTIONS.]

- MISTAKE,**
 as to contents of subscription paper, 97.
 liability of directors for, see **DIRECTORS**.
- MONEYED CORPORATIONS,**
 in New York, cannot make preferences when insolvent, 804.
- MONEY PAID,**
 under a void agreement, when recoverable, 714-724.
- MONOPOLY,**
 grants of, by the legislature, 1057, 1057 a.
 grant of, how construed, 823.
 obligation resulting from acceptance of, 1114.
 power of State to regulate, 1075 b.
- MORTGAGE,**
 implies right of corporation to execute, 846, 847.
 by manufacturing corporation, in New York, 848, 478.
 by railroad company, 400, 1120-1124.
 by corporation *de facto*, 750-758.
 validity, if in excess of charter, 696, 711.
 of franchises, see **FRANCHISE**.
 of shares, who entitled to vote, 488.
- MORTMAIN,**
 statutes of, 328.
- MOTIVE,**
 of suit by shareholder, immaterial, 259, 266.
- MUNICIPAL CORPORATION,**
 meaning of term, 3.
 how created, 24.
 functions of charter of, 1046.
 notice of ordinances and by-laws, 596.
 subscription for shares in railroad company, how affected by consolidation, 949, 951.
 rights of *bona fide* purchasers of bonds of, 612-615.
 effect of acts in excess of charter, 649.
 ratification of unauthorized acts of agents of, 621.
 cannot grant charters of incorporation, 17.
- MUTUAL INSURANCE COMPANY,**
 irregular organization cannot be set up by a member, 743 note.
 by-laws of, 501.

N.

- NAME,**
 the use of a corporate name, 353.
 effect of a misnomer, 354, 355, 770, 771.
 corporation protected from unauthorized use of, 357, 296.
 change of, does not affect identity, 354.
 change of, does not affect creditors, 810-812.
 validity of legislation affecting change of, 11, 1064 note.

[THE REFERENCES ARE TO THE SECTIONS.]

NATIONAL BANKS. See **BANKS AND BANKING.**

power of Congress to charter, 9.
 powers of, generally, 884, 885.
 receipt of special deposits by, 888.
 prohibited loans by, 384, 878.
 cannot reserve lien on shares, 201, 884, 494.
 usury laws applicable to, 869.
 in what courts they may sue and be sued, 987.
 individual liability of shareholders, 882, 902 note.
 appointment of receiver by State court, 866 note.
 cannot make preference among creditors, 805.
 shares not attachable after assignment of certificates, 197.

NEGLIGENCE,

liability of corporation for, 725-734.
 liability of directors for, see **DIRECTORS.**

NEGOTIABLE INSTRUMENTS,

of corporation, effect of seal, 341.
 implied power of corporation to execute, 850-852.
 accommodation note or indorsement unauthorized, 428.
 prohibition from executing or dealing in, 321.
 prohibition from executing except on conditions, 679.
 when shareholder may restrain execution, 275.
 executed in excess of charter, rights of innocent purchasers, 686-688.
 when purchaser may assume authority of agent executing, 597, 602.
 validity of transfer in excess of charter, 712.

NON-USER OF FRANCHISES,

when a cause for dissolution, see **DISSOLUTION.**

NOTES AND BILLS. See **NEGOTIABLE INSTRUMENTS.**

NOTICE,

judicial, of charter, 38, 39.
 of charter by party dealing with corporation, 591.
 of general legislation, 592.
 of articles of joint-stock company, 595.
 of foreign charters and laws, 39, 591, 592.
 of by-laws, 500, 502, 593-595.
 of rights of equitable owners of shares, 181-184.
 to shareholders of calls, 147.
 to shareholders of meetings of shareholders, 479, 481, 482.
 to shareholders of meetings of directors, 531, 532.
 to agents of a corporation, 540*b*, 540*c*.
 to promoters of a corporation, 234.
 to shareholders of a corporation, 229, 234.
 to a corporation of equitable ownership of shares, 181-184.
 judicial, of the nature of a business, 382.
 judicial, of the powers of agents, 509.

[THE REFERENCES ARE TO THE SECTIONS.]

NOVATION,

of members, see **TRANSFER OF SHARES**.
of liability to creditors, 808-818. See **CREDITORS**.

NUISANCE,

liability of corporation for, 726, 727, 733.
construction of franchise to create, 323.
court of equity may abate, 1043.
constitutionality of legislation prohibiting, 1063.

O.

OFFICERS. See **AGENTS; DIRECTORS**.

de facto and *de jure*, meaning of terms, 640.
de facto but not *de jure*, how removed, 643 a.
acting under informal appointment, 636-640.

ORGANIZATION OF CORPORATIONS. See **FORMATION OF CORPORATIONS; SUBSCRIPTIONS FOR SHARES**.

effect of loss of, 1007, 1008.

P.

PAID-UP SHARES. See **CERTIFICATES FOR SHARES**.

issue of, for property, 425-429, 825, 826.
certificates for, rights of innocent purchasers, 836.
unauthorized issue of certificates for, remedies of shareholders, 117, 286-290.
unauthorized issue of certificates for, rights of creditors, see **CREDITORS, II**.
validity of certificates for, see **CERTIFICATES FOR SHARES**.

PARLIAMENT,

power to alter charters, 1044 note.
application to, when enjoined, 296-301.

PARTIES. See **PLEADING AND PRACTICE; REMEDIES**.

to shareholders' bill, plaintiffs, 256, 259-268.
to shareholders' bill, defendants, 257, 258.
to creditors' suit for unpaid capital, 860-868.
to creditors' suit to enforce statutory liability of shareholders, 893-905.

PARTNERSHIP,

compared with corporation, 1, 7, 46, 227.
illegal incorporation does not result in, 748, 749.
corporations have no implied authority to enter into, 421.
entered into by a corporation, validity of contracts of, 697.
statutory liability of shareholders compared with that of members of, 878.

[THE REFERENCES ARE TO THE SECTIONS.]

PARTNERSHIP, — *continued.*

subscription for shares on behalf of, 69.
transfer of interest of partner, 163.
contract of partnership distinguished from contract to form partnership, 46.

PAST SHAREHOLDERS,

liability of, under statutes, 859, 888, 890.

PATENT RIGHTS,

purchase by corporation, 365.
rights of foreign corporation holding, 974 *a*.

PAYMENT,

of dividends, see **DIVIDENDS**.
of deposit by subscriber for shares, 71, 72, 739, 742, 743.
of capital, see **LIABILITY OF SHAREHOLDERS**.
of capital, rights of creditors as to, see **CREDITORS, II**.
for shares in property or services, 425-429, 825, 826.

PENAL LIABILITY,

whether statutory liability of shareholders is, 877. See **CREDITORS, III**.
whether statutory liability of directors is, 906-909.

PERSON,

corporation when regarded as, 1, 227-234.

PERSONAL PROPERTY. See PROPERTY.

shares are, 225.

PLACE,

where a corporation may carry on business, 359-361, 958. See also **FOREIGN CORPORATIONS**.
of meetings of shareholders, 488.
of meetings of directors, 533.
where suit for winding up may be brought, 284, 867 note, 903, 904.

PLAINTIFFS,

to shareholders' bill, 250, 259-268.
to creditors' proceeding, 860-868, 893-905.

PLEADING AND PRACTICE,

remedies, see **REMEDIES**.
shareholders' bills, see **SHAREHOLDERS, II**.
creditors' proceedings, see **CREDITORS**.
how existence of corporation put in issue, 772, 773.
how citizenship of corporation put in issue in United States courts, 975 *a*.
effect of misnomer of corporation, 855.
answer of corporation in chancery, 338, 535 note.
service of process on corporations, 979-983.
suits against corporation chartered by Congress, 985-987.

[THE REFERENCES ARE TO THE SECTIONS.]

PLEDGE,

- implied right of corporation to make, 849.
- of shares by the corporation, 849, 850, 851.
- of shares, who entitled to vote, 488.
- of shares, who liable, 852.
- of shares, rights of attaching creditor, 196 note.

POOLING CONTRACTS,

- among railroad companies, 1030, 1031.

POWERS,

- of legislatures, see **FORMATION OF CORPORATIONS; LEGISLATIVE CONTROL.**
- of corporations, see **CONSTRUCTION OF CHARTERS; VALIDITY OF CORPORATE ACTS, III.**
- of the majority, see **MAJORITY.**
- of agents, see **AGENTS; DIRECTORS.**
- of eminent domain, see **EMINENT DOMAIN.**
- to vote, see **VOTE.**
- to transfer shares, see **TRANSFER OF SHARES.**

PRE-EMPTION,

- where new shares are issued, right of shareholders, 455.

PREFERENCES.

- among creditors of insolvent corporations, 802-805.
- directors of insolvent corporation cannot obtain, 787, 788.

PREFERRED SHARES.

- when the right to issue, exists, 463, 464.
- whether charter may be altered by authorizing issue of, 400, 463.
- rights of holders of, 456.
- dividends on, payable only out of profits, 457.
- guaranty of "interest" or dividends, 456-458.
- where dividends are cumulative, 458.
- discretion of directors to reserve profits, 459, 460.
- preference in distribution of capital, 461.
- dividends, to whom payable after sale of, 180.
- remedies of the holders of, 280, 462.

PRELIMINARY EXPENSES,

- capital may be called in to pay, 139.

PRELIMINARY SUBSCRIPTIONS,

- under statutes, 53, 59.

PRESCRIPTION,

- corporations by, 86.

PRESIDENT,

- powers of, 537, 538.
- of meeting of shareholders, 487, 531.

PRESUMPTIONS,

- of grant of charter, 36.
- of acceptance of charter, 25.

[THE REFERENCES ARE TO THE SECTIONS.]

PRESUMPTIONS, — *continued.*

- of continuance of corporate existence, 775.
- as to powers conferred by charter, 824.
- as to seal of corporation, 840, 616, 617.
- as to acceptance of agency, 504.
- as to powers of agents, 509, 616, 617. See **VALIDITY OF CORPORATE ACTS, I. B.**
- of acceptance of grant, 708 *a.*
- of ratification by shareholders, 628-632.
- of regularity of meetings, 479 *note.*
- of notice of directors of corporate affairs, 500 *a.*
- as to correctness of stock-books, 40, 75, 76, 158.

PRIORITIES,

- among creditors, 864 *note*, 897 *note.*

PRIVATE ACT,

- where grant of charter is, 38.

PRIVATE CORPORATION,

- what is, 3, 4, 7. See **CORPORATION.**

PRIVILEGE. See FRANCHISE.

PROCESS. See SERVICE OF PROCESS.

PROFITS,

- what are deemed, 437-440. See **DIVIDENDS.**
- when agents must account for, 525. See **AGENTS; DIRECTORS.**

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS.

PROMOTERS,

- meaning of term, 545.
- liability of corporation for acts of, 234, 547-549.
- dealings of, with corporation, 545, 546.
- frauds by, remedies, 291-293.

PROOF. See also PRESUMPTIONS; JUDICIAL NOTICE.

- of charter, 86, 40.
- of legal incorporation, 36, 37, 40-42.
- of corporate existence, 774, 776-778.
- of corporate existence, when necessary, 37, 770-773.
- that a person is a shareholder, 74-76.
- of subscriptions for shares, 74-77, 158.
- of calls and notice, 158.
- to charge shareholder with statutory liability, 886, 887.
- of ratification by the corporation, 633.
- of authority of agents, 616.
- against corporation by admissions of agents of corporations, 540 *a.*
- by books of corporation, 40, 75, 76, 158.

PROPERTY,

- implied right of corporation to acquire, 827.
- statutes of mortmain, 328.
- construction of provisions limiting right to acquire, 829, 830.

[THE REFERENCES ARE TO THE SECTIONS.]

PROPERTY, — continued.

- amount which corporation may hold, 329.
- effect of limitation of duration of charter, 330.
- devises of, to corporations, when valid, 331-333.
- when corporation may hold in trust, 334.
- transfer of, when authorized, 335, 420, 422.
- transfer by directors to pay debts, 513, 802-805.
- conveyance of, how executed, 233, 335.
- validity of acquisition or transfer of, in violation of the charter, 673.
- See **VALIDITY OF CORPORATE ACTS, III. F.**
- acquisition or transfer of, by corporation *de facto*, 753, 754.
- receipt of, by corporation, subject to equities, 229, 231.
- of corporation, how affected by dissolution, 1031-1035.

PROSPECTUS,

- liability of directors for issuing false, 570-573.
- fraudulent, when a ground of avoiding subscriptions, 100, 103, 105.
- See **SUBSCRIPTIONS FOR SHARES, III.**

PROXY,

- right to vote by, 436.

PUBLIC,

- corporations, 3. See **MUNICIPAL CORPORATIONS.**
- law, when charter is, 38.
- duties of corporations, see **DUTIES TO THE PUBLIC.**

PUBLICATION,

- of notice of calls, 147.

PUNITIVE DAMAGES,

- liability of corporation for, 728, 729.

PURCHASE,

- of property, see **PROPERTY.**
- of shares, see **SHARES.**

Q.

QUANTUM MERUIT,

- for value received under void contract, 714-724.

QUASI CORPORATION,

- meaning of term, 6.
- recognized by comity in foreign States, 989, 990.

QUORUM,

- at shareholders' meeting, 476.
- at directors' meeting, 492, 531.

QUO WARRANTO,

- extinguishment of franchises by, 938.
- dissolution of corporations by, 1014, 1030. See **DISSOLUTION.**

[THE REFERENCES ARE TO THE SECTIONS.]

R.

RAILROAD COMPANIES,

what transactions of, are authorized, 368, 394. See CONSTRUCTION OF CHARTERS.

acquisition of land by, 369, 370, 394.

arrangements for acquisition of railroad, 371, 372.

purchase of railroad already built, 371, 372.

construction of branch roads and extensions, 373.

purchase of steamboats and other conveyances, 364, 374.

purchase of coal mines by, 362, 364, 394.

contracts to carry beyond the limits of their lines, 375, 394.

traffic arrangements among connecting lines, 376, 377.

arrangements for running powers, when authorized, 378-380.

pooling arrangements among competing lines, 1130, 1131.

must operate their roads by their own agents, 381.

unauthorized guaranty of music festival by, 394.

alteration of charter of, see ALTERATION OF CHARTER.

contract in anticipation of alteration unauthorized, 398.

guaranty of bonds of other company, 423.

transfer of property of, 1120-1124.

leases of property of, 379, 1120-1124.

mortgages of property of, 400, 1120-1124.

transfer or mortgage of franchises of, see FRANCHISE.

execution against property of, 1125.

duties of, to the public, see DUTIES TO THE PUBLIC.

duty to operate railroad, 414, 656, 1116.

discrimination among shippers, 656, 1117.

remedies against, to enforce performance of duties, 1043, 1017-1021, 1132-1136.

power of legislature to regulate, 1067, 1073, 1099. See LEGISLATIVE CONTROL.

laws regulating charges, 1074-1075 *d.*, 1094.

are instruments of commerce, 974, 1075 *d.*

chartered by several States, laws regulating, 970-974.

chartered by several States, mortgage of, 996, 1122.

subscription for shares in, on condition as to location, 79.

RATES,

constitutionality of laws regulating, 1074-1075 *d.*

of railroad companies must be reasonable, 1117.

RATIFICATION,

of unauthorized acts of corporate agents, 618-635.

effect of, — illegality of act not cured by, 619.

bars right of shareholder to relief, 261-263.

rights of creditors cannot be impaired by, 620, 621.

by municipal and charitable corporations and savings banks, 621.

[THE REFERENCES ARE TO THE SECTIONS.]

RATIFICATION, — *continued*.

- of sale or lease by railroad company, 620.
- by the shareholders, 623-625.
- previous assent equal to, 228.
- of acts in excess of the charter, 249, 619, 622, 624, 625.
- of alteration of charter, or consolidation, 628.
- of unauthorized issue of paid-up shares, 290.
- of misapplication of funds, 624, 625, 249.
- of torts, 731.
- of informal acts and contracts, 634, 635.
- of informal appointment of officers, 638.
- of informal meeting, 490.
- by directors and other agents, 622, 627.
- by the majority, 626, 246, 247, 249.
- by the majority, of acts in excess of the charter, 249, 490, 622, 626.
- what operates as ratification by the shareholders, 628-632.
- estoppel by acquiescence or laches of shareholders, 628, 630.
- when presumed, 629, 632.
- proof of, 633.
- of unauthorized subscription, 68, 843.
- by corporation, of irregular subscription, 65, 743.
- of irregular transfer of shares, 222, 223, 743.
- of unauthorized calls, 155.
- of contracts of promoters, 548, 549.
- of dealings of agent with corporation, 625.
- shareholders' suit barred by, 261-263.
- by the legislature, of unauthorized incorporation, 10 note, 20, 786.
- by the legislature, of unauthorized consolidation, 941.
- by the legislature, of claim of franchises, 319.
- by the legislature, of illegal acts and contracts, 651.

REAL ESTATE. See **PROPERTY**.

- power of corporation to acquire and transfer, see **PROPERTY**.
- shares are not, 224.

RECEIVER,

- when appointed at suit of shareholder, 281.
- power to collect assets for creditors, 867, 868.
- power to enforce statutory liability of shareholders, 869, 902.
- of national banks, 866 note, 902 note.

REDEMPTION,

- of shares after forfeiture, 126, 127.

REDUCTION OF CAPITAL STOCK,

- not impliedly authorized, 434, 112-114.
- by purchase of shares, 112-114.
- effect as to creditors, 883.

[THE REFERENCES ARE TO THE SECTIONS.]

REGULATION,

- of commerce, see **COMMERCE**.
- of corporations by the legislature, see **LEGISLATIVE CONTROL; RAILROAD COMPANIES**.
- of rates by the legislature, 1074-1705 *d*.

REISSUE OF SHARES,

- which have come back to the corporation, 114.

RELEASE,

- of shareholder by corporation, 109, 117, 303, 313 note. See **SUBSCRIPTIONS FOR SHARES, IV**.
- of shareholders, validity as to creditors, 824, 841.

RELIGIOUS CORPORATION,

- meaning of term, 4.

REMEDIES,

- of shareholders, see **SHAREHOLDERS, II**.
- of creditors, to reach corporate assets, 794-796, 860-868. See **CREDITORS, II**.
- of creditors to enforce statutory liability of shareholders, 893-905. See **CREDITORS, III**.
- of creditors to enforce statutory liability of directors, 910.
- of creditors after a consolidation, 954-957.
- available to corporations, 857, 858.
- of corporation, where agents misuse their powers, 525, 550.
- to remove offending directors, 542, 543.
- to remove officers *de facto*, 543 *a*.
- of State to annul franchises and obtain dissolution, 1014, 1030.
- of State for usurpation of franchise, 938.
- of State to restrain unauthorized corporate acts, 1040-1043.
- of State to enforce duties to the public, 1182-1186.
- change of, by statute, 876.
- constitutionality of laws providing new remedies, 1076.
- against foreign corporations, see **FOREIGN CORPORATIONS**.
- by or against foreign joint-stock companies, 989, 990.
- specific performance, see **SPECIFIC PERFORMANCE**.

REMOVAL,

- of agents from office, 541-543.
- of officers *de facto*, 543 *a*.
- of suits into Federal courts, see **UNITED STATES COURTS**.

REORGANIZATION AND REVIVOR,

- nature and consequences of, 811, 812.
- by statute, restoring franchises, 1038.

REPEAL,

- of by-laws, 499.
- of charter or franchises, see **LEGISLATIVE CONTROL, I**.
- reservation of power of, see **LEGISLATIVE CONTROL, II**.

REPORTS,

- liability of agents fraudulently issuing, 573.

[THE REFERENCES ARE TO THE SECTIONS.]

- REPRESENTATIONS, FRAUDULENT.** See **FRAUD; SUBSCRIPTIONS FOR SHARES, III.**
- RESCISSION,**
of shares and subscriptions, see **SUBSCRIPTIONS FOR SHARES, IV.**
- RESERVATION,**
by legislation, of power to alter or repeal charters, see **LEGISLATIVE CONTROL, II.**
- RESIDENCE,**
of corporations, 958 note, 959. See **PLACE ; FOREIGN CORPORATION.**
of directors, 361.
- RESIGNATION,**
of directors, 563, 564.
- RESTRAINT OF TRADE,**
by-law operating as, 495.
contract operating as, 1181.
- REVERTER,**
of property on dissolution of corporation, 1031, 1032.
- REVIVOR OF CORPORATIONS.** See **REORGANIZATION AND REVIVOR.**
- REVOCATION,**
of powers of agents, 541, 542.
- REWARD,**
by bank for apprehension of thief, 424.
- RIGHTS,**
of shareholders, see **SHAREHOLDERS.**
of creditors, see **CREDITORS.**
- RIVAL COMPANY,**
suits in interest of, 259, 260, 266.
- RUNNING ARRANGEMENTS,**
among railroad companies, see **RAILROAD COMPANIES.**

S.

- SALE,**
of property, see **PROPERTY.**
in excess of charter, validity of, see **VALIDITY OF CORPORATE ACTS, III. F.**
of franchises, see **FRANCHISE.**
of shares, see **SHARES; TRANSFER OF SHARES.**
- SALVAGE,**
corporation may sue for, 357.
- SAVINGS BANK,**
nature and business of, 390.
rights of depositors, 391, 500.
rules and by-laws of, 500, 501.
ratification of unauthorized acts of agents of, 621.

[THE REFERENCES ARE TO THE SECTIONS.]

SCIRE FACIAS,

to dissolve corporation, 1030.

SCRIP DIVIDENDS. See **DIVIDENDS.**

SEAL,

when corporation must use, 338, 172, 498.

what sufficient, and how affixed, 339.

presumptions as to, 340, 616, 617.

negotiable instruments under, 341.

legal effect of sealing, 340, 341.

failure to use when prescribed, 582 note.

SECRET AGREEMENT,

with subscriber for shares, when invalid, 303.

SERVANTS. See **AGENTS.**

SERVICE OF PROCESS,

on corporations, 979.

on corporation chartered by other States, 979-983.

on foreign corporations in United States courts, 982.

on shareholders, does not bind corporation, 234 note.

after dissolution, on agent of corporation, 778.

method of, may be altered by law, 1081.

SET-OFF,

of liability for dividends due to shareholder, 201 note.

by shareholder of insolvent corporation, 861, 862, 898.

SHAREHOLDERS,

I. Constitute the corporate association, 1, 7, 33, 227.

creation of, see **FORMATION OF CORPORATION ; SUBSCRIPTIONS FOR SHARES.**

release of, see **SUBSCRIPTIONS FOR SHARES, IV.**

transfer of membership, see **TRANSFER OF SHARES.**

liability of, to the corporation, see **LIABILITY OF SHAREHOLDERS.**

liability of, to creditors, see **CREDITORS.**

meetings of, see **MEETINGS.**

ratification by, see **RATIFICATION.**

are not agents for the corporation, 238.

wrongs of, corporation not responsible for, 234.

process served on, does not bind corporation, 234 note.

notice to, affects corporation, when, 229, 234.

have no title to corporate property, 238.

interest of, in corporation, 231 note, 237.

distinction between several and collective rights of, 235, 237, 277, 278, 566.

right to dividends, see **DIVIDENDS.**

right to examine company's books, 473.

right to certificate for shares, 472.

right to transfer shares, see **TRANSFER OF SHARES.**

rights where new shares are issued, 454, 455.

[THE REFERENCES ARE TO THE SECTIONS.]

SHAREHOLDERS, — continued.

- remedy for wrongful acts impairing value of shares, 566, 567.
- removal of directors by, 542-543 *a*.
- rights as against agents, see AGENTS; DIRECTORS.
- rights after dissolution of the corporation, 1032.
- constitutionality of legislation affecting, see LEGISLATIVE CONTROL.
- II. *Rights and remedies in equity*, 235-301.
 - distinction between several and collective rights of, 235, 237, 277, 278.
 - interest of, in corporation, 237.
 - right to sue on behalf of corporation, — general rule, 238.
 - cannot sue if corporation is able to act, 239.
 - cannot sue unless agents unwilling or unable, 240.
 - cannot sue unless relief through majority impossible, 240, 244.
 - when demand upon directors is necessary, 241, 242.
 - discretionary powers of agents cannot be impaired, 243.
 - discretion of agents as to propriety of suing, 244, 248.
 - where the directors have committed a breach of duty, 245 *et seq.*
 - exception where act may be ratified by majority, 246, 247.
 - where acts of directors cannot be ratified, 249.
 - where preventive relief applied for, 250, 254.
 - where delay until directors may be removed necessary, 251-254.
 - when the court will fully dispose of a case, 255.
 - parties to shareholders' bill, 256.
 - who must be made defendant, 257, 258.
 - form of suit by shareholder, 256.
 - who can sue, where shares held in trust, 256, 260.
 - motive of bringing suit immaterial, 259, 266.
 - plaintiff must have a real interest, 260.
 - suit in interest of a rival company, 260.
 - acquiescence of corporation bars suit, 261.
 - plaintiff who has acquiesced cannot sue, 262, 263.
 - if plaintiff disqualified, suit cannot proceed, 264.
 - where a transferee of shares can sue on account of prior wrongs, 265-269.
 - equity rule 94, in United States courts, 269.
 - complicity of part of shareholders not a ground for withholding relief, 294.
 - frauds of majority, 249, 274.
 - when shareholder can sue on behalf of corporation, — general rule, 270, 271.
 - nature of cause of action of shareholder, 271.
 - suit for wrongs committed by individual shareholders, 272.
 - where acts causing forfeiture of franchises are threatened, 273.
 - where rivalry of directors threatens loss, 273, 281.
 - where directors refuse to call a meeting, 273, 480.
 - suit for violation of charter, — misapplication of funds, 274.
 - unauthorized acts causing liability may be restrained, 275.

[THE REFERENCES ARE TO THE SECTIONS.]

SHAREHOLDERS, — *continued.*

- unauthorized payment of dividends, or failure to pay, 276, 450, 451.
- unauthorized forfeiture of shares, or expulsion, 277.
- unfair discrimination among, 279.
- unauthorized calls, 150.
- privileges of preferred shareholder protected, 280, 462.
- interference with management, when justified, 281, 285.
- winding up corporation at suit of, 282-285.
- unauthorized issue of certificates for shares, 286-290.
- frauds by promoters, remedy, 291-293.
- unauthorized use of funds or name to procure alteration of charter, 295, 296.
- action under void alteration, 297.
- restraining applications to the legislature, 298-301.
- III. *Equities among shareholders*, 302-315.
 - each entitled to specific performance of contract of others, — release, 302, 313 note.
 - colorable subscriptions, — secret agreements, 303.
 - legal holder of shares liable for calls, 304.
 - legal holder entitled to vote, 304.
 - ratable distribution of liabilities, 305, 154, 444.
 - when issue of paid-up shares unauthorized, 306.
 - validity of subscriptions on special terms, 307.
 - ratable distribution of dividends, 305.
 - party acting as shareholder liable as shareholder, 308.
 - forfeiture of shares, when unauthorized, 309.
 - transfer of shares, when unauthorized, 310.
 - winding-up corporations, equities among shareholders, 311-315, 866, 894.

SHARES,

- preferred shares, see **PREFERRED SHARES.**
- transfer of, see **TRANSFER OF SHARES.**
- cancellation of, see **CANCELLATION OF SHARES.**
- distinguished from certificates for shares, 226.
- are choses in action, and personal property, 119, 200, 224, 225.
- difference between purchase and subscription, 61, 65, 110, 118.
- nature of an original issue of, 288.
- original issue in trust by the corporation, 349, 850, 851.
- paid-up shares and their issue, 286-290, 306, 425-429.
- value of, 288, 826.
- validity of issue in excess of amount authorized, 683, 761-767.
- validity of issue on prohibited terms, 679.
- effect of limitation of number which may be held, 85 note, 679 note.
- purchase of, by the corporation, 431-434, 112-114.
- remedy for wrongful acts impairing value of, 566, 567.
- sale by corporation issuing, 61, 65.
- sale by holder complete on delivery of certificates, 213.

[THE REFERENCES ARE TO THE SECTIONS.]

SHARES, — continued.

- purchaser entitled to valid certificates, 118, 191.
- sale within statute of frauds, 226.
- rescission of contract for sale, 110, 118.
- after sale, right to dividends and liability for calls, 175-178, 449.
- trusts of shares, see **TRUSTS**.
- remedies where the corporation refuses a transfer, 214-221.
- right of transferee to sue for wrongs to the corporation, 265-269.
- sale under power of forfeiture, see **FORFEITURE OF SHARES**.

SLANDER. See **LIBEL AND SLANDER**.**SOLE CORPORATION,**

- distinguished from corporation aggregate, 2.

SOLE SHAREHOLDER,

- not liable on corporate obligations, 282.
- cannot convey corporate title, 283.

SPECIAL ACT,

- of incorporation, when unconstitutional, 10-14.

SPECIAL AGREEMENTS,

- with subscribers for shares, see **SUBSCRIPTIONS FOR SHARES, II**.

SPECIAL DEPOSITS,

- may be received by banks, 388, 540.

SPECIAL FRANCHISE. See **FRANCHISE**.**SPECIAL MEETINGS.** See **MEETINGS**.**SPECIFIC PERFORMANCE.** See **EQUITY; REMEDIES**.

- of contract for sale of shares, 218.
- of transfer of shares, 214, 220.
- of obligation created in excess of the charter, 681-684, 688.
- of contract to construct or operate a railroad, 1184 note, 1186 note.

STATES,

- may hold shares in private corporations, 3, 35.
- legislative powers of, see **LEGISLATIVE CONTROL**.
- in which corporations may act, see **FOREIGN CORPORATIONS; PLACE**.
- of corporations chartered by several States, see **FOREIGN CORPORATIONS, II**.

STATUTES,

- of incorporation, see **FORMATION OF CORPORATIONS**.
- regulating foreign corporations, 661-665. See **FOREIGN CORPORATIONS**.
- providing for service of process on foreign corporations, 982, 983.
- reincorporating or licensing corporations of other States, 991-1001.
- which apply to corporations, 1061, 1091, 1092.
- which apply to foreign corporations, 964.
- which apply to corporation chartered by several States, 998, 999.
- of limitations, application to liability of shareholders, 822 note.

[THE REFERENCES ARE TO THE SECTIONS.]

STATUTES, — *continued.*

- of limitations, applicable to statutory liability of shareholders, 873, 877.
- of limitations, application to suit against directors, 550 note.
- of limitations, enactment is constitutional, 814, 1080.
- of frauds, application to sales of shares, 224, 226.
- for winding up corporations after dissolution, 1086, 1087.
- prohibiting usury, 668-669.
- prohibiting unauthorized banking, 670.
- prohibiting devises to corporations, 671. See DEVISES.
- of mortmain, 328.
- of wills, 331-333.
- notice of, when to be taken, 591, 592. See NOTICE.
- effect of violation of, by corporations, see VALIDITY OF CORPORATE ACTS, III. A.
- constitutionality of, see LEGISLATIVE CONTROL.

STATUTORY LIABILITY,

- of shareholders to creditors, 869-905. See CREDITORS, III.
- of directors to creditors, 906-909.

STEAMBOAT,

- right of railroad company to purchase, 364, 367 a, 374.

STOCK. See SHARES; SHAREHOLDERS.

STOCK-BOOKS. See BOOKS.

- subscriptions on, see SUBSCRIPTIONS FOR SHARES, I.
- evidence in favor of corporations, 75, 76. See PROOF.
- transfers of shares on, 170. See TRANSFER OF SHARES.

STOCK DIVIDENDS. See DIVIDENDS.

- the right to make, 452, 453.
- equities among shareholders as to, 454.
- rights as between tenant for life of shares and remainderman, 468-471.

STOCK SUBSCRIBERS. See SUBSCRIPTIONS FOR SHARES.

STRIKES OF LABORERS,

- when an excuse for not operating a railroad, 1110.

SUBSCRIPTION BOOKS. See STOCK-BOOKS; SUBSCRIPTIONS FOR SHARES.

SUBSCRIPTIONS FOR SHARES,

- I. *Formation of contract of membership*, 43-108. See also FORMATION OF CORPORATIONS.
 - general character of contract of membership, 43-46.
 - subscription distinguished from contract to take shares, 46.
 - mutual agreements to form a corporation, 47.
 - enforcement of such agreement, 50-52.
 - offer to become shareholder in future corporation, 48-50.
 - agreement to *subscribe* for shares in future corporation, 49.
 - preliminary subscription under statutes, 53, 59.

[THE REFERENCES ARE TO THE SECTIONS.]

SUBSCRIPTIONS FOR SHARES, — *continued.*

- statutory subscriptions for shares, before organization, 55.
 - nature and effect of, under statutes, 56.
 - whether subscription of entire capital a condition precedent to effect of, 57.
 - are binding as soon as made, 59.
 - subscriptions after organization, acceptance necessary, 60.
 - difference between contract to purchase shares and subscription, 61.
 - excessive subscriptions, effect of, 58.
 - assent of subscriber necessary, 62, 63, 843.
 - effect of alteration of articles before incorporation, 62.
 - abandonment of subscription list by mutual consent, 63.
 - subscription through agents, 63, 843.
 - ratification of unauthorized subscription, 63, 843.
 - agents who can receive, 64.
 - powers of agents receiving, 66.
 - apportionment of shares among subscribers, 66.
 - formalities prescribed by law, 67 *et seq.*
 - formalities not necessary on sale after organization, 65.
 - conditions precedent to incorporation must be performed, 67, 737-739.
 - form of subscriptions on books, 69.
 - must be in writing, 69.
 - allotment of shares, 70.
 - payment of deposit, when necessary, 71, 739, 742, 743.
 - payment of deposit, when not necessary, 72.
 - irregular subscriptions, 73, 735-743.
 - proof of, 74-77.
 - proof of, by entry on stock-books, 75, 76.
 - are contracts in writing, 77.
 - who may be a subscriber, 85.
 - by corporation not impliedly authorized, 433.
 - by municipal corporations, 949, 951.
 - in fictitious names, 303, 855.
 - intended to be colorable, 107.
 - liability resulting from, *see* LIABILITY OF SHAREHOLDERS.
 - validity, if illegal or irregular, *see* ILLEGAL INCORPORATION.
- II. *Conditional subscriptions, 78-93.***
- subscription on condition precedent a mere offer, 78, 81.
 - distinguished from subscriptions on special terms, 82.
 - distinguished from subscriptions with condition as to liability, 149.
 - condition as to amount of subscriptions, 78, 141.
 - conditions as to location of railroad, 79, 80, 89, 90.
 - power of agents before organization to accept, 83.
 - power of managing agents to accept, 84, 85, 87.
 - acceptance of special terms, 86.
 - special terms as to payment of capital, 87.

[THE REFERENCES ARE TO THE SECTIONS.]

SUBSCRIPTIONS FOR SHARES, — continued.

agreements to pay unconditionally, 149.
 where all subscriptions are on the same terms, 88.
 whether subscription conditional or on special terms, 89, 90.
 waiver of conditions, — when conditions disregarded, 91–93.
 validity of conditions as to creditors, 821–823, 842, 845, 849.

III. Subscriptions obtained by fraud,

are voidable, 94.
 representations as to matters of law, 95.
 representations as to legal effect of contract, 96.
 representations as to contents of paper, 97.
 representations amounting to promises, 98.
 representations as to matters of opinion, 98, 99.
 representations must have deceived subscriber, 100.
 representations must have been material inducements, 101.
 power of agents making representations, 102, 103.
 representations must have been fraudulent, 104.
 what representations will avoid a subscription, 104–107.
 effect of fraud in a prospectus, 100, 103, 105.
 effect of colorable subscriptions, 107.
 laches bars right to avoid subscriptions, 108.

IV. Rescission of shares and subscriptions, 109–121. See CANCELLATION OF SHARES.

not impliedly authorized, 109, 302.
 validity of, as to creditors, 841. See CREDITORS, II.
 distinguished from rescission of contract to purchase, 110, 118.
 cancellation of shares explained, 111.
 caused by purchase of shares by the corporation, 112–114.
 violation of charter not a cause for, 115–117.
 wrongful acts of agents not a cause for, 116, 117.
 by unanimous consent under authority of legislature, 119, 120.
 when alteration of charter a cause for, 120.
 alteration under reserved power not a cause for, 121.
 consolidation when a cause for, 951.

SUCCESSORS,

use of word not necessary to grant of fee to a corporation, 330.

SUITS. See REMEDIES; PLEADING AND PRACTICE; EQUITY.

implied right of corporation to maintain, 356–358.
 when corporation may pay expenses of, 430.
 of corporations abate on dissolution, 1031.
 by-law restraining right to sue, invalid, 495, 496.
 by shareholders, see SHAREHOLDERS.
 by creditors, see CREDITORS.

SURETY. See GUARANTY.

when corporation may become, 394, 423.
 of agent, discharged by alteration of agency, 807 note.
 liability of shareholder compared with that of, 879.

[THE REFERENCES ARE TO THE SECTIONS.]

- SURPLUS,**
 earnings, see **DIVIDENDS**.
 property, use of, for collateral purposes, 867.
- SURRENDER,**
 of charters, dissolution by, 1011.
 power of majority to surrender charter, 418.
- SUSPENSION,**
 of officers of corporations, 541-548.
 of payments by bank when a cause for dissolution, 1027.

T.

- TAXATION,**
 constitutionality of, 1085.
 in aid of corporations, when constitutional, 1114.
 exemption from, see **EXEMPTION**.
 corporation cannot restrain levy of unconstitutional tax on shares,
 236 a, note.
- TELEGRAPH COMPANY,**
 are instruments of commerce, 974 a.
 rights of, under acts of Congress, 974 a.
 duties of, to the public, 1114, 1129.
- TENDER,**
 of certificate for shares, when necessary, 61, 148.
- TERRITORIAL GOVERNMENT,**
 may charter corporations, 17.
- TERRITORIAL LIMITS,**
 of corporate action, see **FOREIGN CORPORATIONS ; PLACE**.
- TIME,**
 when a corporation may begin business, 408-410.
 of duration of corporations, 411, 418.
- TITLE.** See **PROPERTY**.
- TORTS,**
 liability of corporations for, 725-734.
 liability of agents for, 569.
- TRADE,**
 by-law in restraint of, 495.
 contracts in restraint of, 1131.
- TRAFFIC ARRANGEMENTS,**
 among railroad companies, see **RAILROAD COMPANIES**.
 among competing companies, 1130, 1131.
- TRANSFER,**
 of property, see **PROPERTY**.
 of franchises, see **FRANCHISE**.
 of assets, rights of creditors as to, see **CREDITORS**.

[THE REFERENCES ARE TO THE SECTIONS.]

TRANSFER OF SHARES,

- effect of, upon rights and liabilities of holder, 159, 160.
- liability for calls after, 161.
- effect of, as to creditors, 858.
- effect of, under English Companies Acts, 859.
- discharge of statutory liability to creditors, by, 858, 888, 891.
- liability of past members, 890.
- right to dividends after, 162.
- rights of transferee to sue on behalf of corporate interests, 265-269.
- in joint-stock companies at common law, 163.
- in corporation, impliedly authorized, 164.
- when assent of agents of corporation necessary, 165.
- must be accepted by transferee, 223.
- by-laws regulating, 164.
- after insolvency of corporation, 166, 167, 810.
- after dissolution of corporation, 168.
- formalities must be observed, 169.
- on stock-books, why necessary, 170.
- on stock-books necessary to make assignee a shareholder, 170.
- on stock-books necessary to discharge assignor, 170, 856.
- on stock-books necessary to discharge lien of corporation, 171, 206.
- how executed on books, 172.
- who has power to execute, 172.
- surrender of certificate required, 172, 186.
- whether power of attorney in writing necessary, 192.
- issue of new certificate not necessary, 173.
- assignment without transfer, 174-184.
- sales of shares, 174-180.
- right to dividends, as between vendor and purchaser, 175, 177, 178.
- liability for calls, as between vendor and purchaser, 176.
- liability of purchaser to indemnify vendor, 175, 856 note.
- sale of preferred shares, right to dividends, 180, 449.
- what is notice of rights of assignee without transfer, 181-184.
- notice of will where shares are held by executor, 182.
- effect of notice that shares are held in trust, 183, 184.
- corporation may use reasonable precaution before allowing transfer by trustee, 183 note.
- assignment by indorsement of certificate, 185.
- rights of purchasers of certificates, 189, 190.
- indorsement of certificate a warranty of genuineness, 191.
- power of attorney on certificate a mere form, 192.
- rights of creditors of shareholder on books after assignment, 193-200.
- right of attaching creditors of assignor, 196-199.
- lien reserved by corporation must be discharged, 201, 203.
- character and extent of lien on shares, 204, 205.
- lien when not enforceable, 206.

[THE REFERENCES ARE TO THE SECTIONS.]

TRANSFER OF SHARES, — *continued.*

- waiver of lien, 207.
- unauthorized, does not divest rights of shareholder, 208.
- under forged power of attorney, 208-210 *a.*
- party claiming may be required to show title, 211.
- liability to creditors where corporation refuses to allow, 856 note.
- remedies against corporation wrongfully refusing, 208, 212-221.
- remedies of assignor where corporation refuses, 212-215.
- remedies of equitable owner or assignee, 216-221.
- agent refusing to permit not personally liable, 565.
- irregular transfers*, — ratification, 222, 223, 677, 748.

TRANSPORTATION. See RAILROAD COMPANIES; CARRIERS.

TROVER. See CONVERSION.

TRUSTEES. See TRUSTS.

- of corporations, see DIRECTORS.
- where incorporated, 34.

TRUSTS. See EQUITY.

- when corporation may assume, 334, 337 *a.*
- between corporation and shareholders, 237.
- laws impairing unconstitutional, 1049.
- fund for security of creditors, see CREDITORS.
- liability of agents to account as trustees, 525.
- liability of agents for funds held by the corporation in trust, 569.
- of shares, rights of equitable owners, 174, 256, 260.
- of shares, rights of trustee, 304, 483.
- of shares, liability of equitable owners, 853, 854.
- of shares, liability of trustee, 304, 852.
- of shares, for benefit of corporation, trustee not liable, 850, 851.
- of shares, assignment without transfer creates, 856 note.
- of shares, by issue of the corporation as collateral security, 850, 851.
- of shares, right of trustee to indemnity, 175, 856 note.
- of shares, what is notice to the corporation, 181-184.
- of shares, remedy of equitable owner against the corporation, 220, 221.

U.

ULTRA VIRES,

- meaning of term, 648, 649, 700, 705.
- what corporate acts are authorized, see CONSTRUCTION OF CHARTERS.
- validity of unauthorized corporate acts, see VALIDITY OF CORPORATE ACTS.

UNITED STATES COURTS,

- jurisdiction depending on citizenship, 975.
- jurisdiction in suits by or against national banks, 987.

[THE REFERENCES ARE TO THE SECTIONS.]

UNITED STATES COURTS,—*continued.*

- jurisdiction in suit by or against corporations chartered by Congress, 985-987.
- jurisdiction depending on citizenship of corporations chartered by several States, 999, 1001.
- jurisdiction depending on citizenship of joint-stock companies, 989, 990.
- stipulations of foreign corporations not to remove suits into, 971.
- service of process on corporations in, 982.
- equity rule 94 as to shareholders' bills, 269.

USURY,

- by corporations, effect of, 667, 668.
- by national banks, 669.
- by foreign corporations, 964.

V.

VALIDITY OF CORPORATE ACTS,

- general principles governing, 575, 576.
- illegal formation of corporations, see ILLEGAL INCORPORATION.
- of foreign corporations, 661-665, 696, 958, 963, 967. See FOREIGN CORPORATIONS.

I. *Responsibility of a corporation for the acts of its agents, — general rule,* 577, 578. See also AGENTS.

A. Corporations not bound by unauthorized acts of their agents, 579.

- acts or contracts in excess of the charter, 580.
- executed transactions not binding if unauthorized, 581, 632.
- informal acts of agents, 582-584.
- informal appointment of agents, 636-640.
- proof of authority of agents, when required, 616.
- dissolution of corporations for wrongs of agents, 1016, 1028.

B. Liability as against party entitled to assume agent's authority, 585-617.

- liability for acts authorized under ordinary circumstances, 587, 597 *et seq.*
- no liability for acts unauthorized under ordinary circumstances, 607.
- liability where authority depends upon facts peculiarly within the agent's knowledge, 588, 610 *et seq.*
- when a party dealing with an agent may assume his authority to do an act, — the authorities, 606-609.
- no liability unless party dealing with agent is misled by the agent's apparent authority, 589.
- when party dealing with agent must ascertain his authority, 590, 593, 609.
- notice of terms of the charter presumed, 591, 595.
- notice of legislation affecting the corporation, 592.

[THE REFERENCES ARE TO THE SECTIONS.]

VALIDITY OF CORPORATE ACTS, — *continued.*

- notice of by-laws, — secret instructions, 593–595.
- notice of ordinances of municipalities, 596.
- party having notice of agent's excess of authority cannot charge corporation, 589, 584 note.
- when regular appointment of agent may be presumed, 637.
- when authority to issue or indorse negotiable paper may be presumed, 597, 602, 606.
- when authority to make a contract may be presumed, 598.
- when authority to buy or sell may be presumed, 599, 606, 609.
- limitation of authority to borrow or issue securities to a gross sum, 600.
- limitation of authority to borrow to a single occasion, 601.
- liability to purchasers of negotiable paper or certificates issued by agents, 602, 603.
- liability to assignees of non-negotiable obligations issued by agents, 604.
- liability for false representations of agents, 605, 611.
- liability for fraudulent issue of certificates for shares, 605.
- when compliance with prescribed formalities may be presumed, 610, 611.
- officers of corporation cannot assume compliance with formalities, 684 note.
- rights of *bona fide* purchaser of municipal bonds, 612–615.
- proof of authority of agents, — presumptions, 616, 617.
- C. *Ratification of unauthorized acts*, 618–635. See also RATIFICATION.
- scope of the doctrine of ratification, — illegality cannot be cured, 619–621.
- rights of creditors and the State cannot be impaired by, 620.
- application of the doctrine of ratification to municipal and charitable corporations and savings banks, 621.
- ratification by the shareholders, 623–625.
- ratification of acts in excess of the charter, 619, 622, 624, 625.
- ratification of alteration of charter or consolidation, 623.
- ratification of misapplication of funds, 249, 625.
- ratification of informal acts and contracts, 634, 635.
- ratification of informal appointment of agents, 636.
- by directors and other agents, 622, 627.
- by the majority, 626.
- what operates as ratification by shareholders, 628–632.
- estoppel by acquiescence or laches of shareholders, 628, 630.
- presumption of ratification, 629, 632.
- proof of ratification, 633.
- II. *Responsibility of a corporation for the acts of the majority*, 641–647.
- See also MAJORITY.
- the powers of the majority, 641, 642.

[THE REFERENCES ARE TO THE SECTIONS].

VALIDITY OF CORPORATE ACTS, — *continued.*

unauthorized acts of the majority not binding, 643, 644.
 the majority cannot alter the charter, 645.
 the majority cannot effect a consolidation, 646.
 when the corporation is bound by unauthorized acts of the majority, 647.

III. *The legal effect of common law and statutory prohibitions upon the validity of corporate acts, 648-734.*

general principles determining the validity of illegal corporate acts and contracts, 648-654.

illegality may be cured by the legislature, 20, 1080.

A. *Effect of statutory or common law prohibitions, 654 et seq.*

contracts illegal at common law, 655, 656.

unauthorized transfers of franchises, 930, 931.

contracts prohibited by the charter or by statute, 657, 666.

effect of general statutory prohibitions against unauthorized corporate acts, 658-660.

effect of statutes regulating foreign corporations, 661-665.

usurious contracts, 666-669.

unauthorized banking, 670.

prohibited devises to corporations, 671.

effect of regulations for the protection of shareholders, 672 *et seq.*

dealings in prohibited securities, 673, 674.

prohibited loans, 673, 674.

effect of regulations for the management of corporations, 674.

effect of provisions prescribing formalities in the corporate transactions, 675-677.

contracts not in compliance with prescribed formalities, 675.

appointment of officers not in accordance with charter, 676.

subscriptions for shares and transfers not in accordance with prescribed forms, 677.

prohibited transfers of property, 678.

prohibited issues of shares, 679.

prohibited issues of negotiable securities, 680.

B. *Specific performance of an act in violation of the charter will not be decreed, 681.*

active trust in violation of the charter not enforceable, 682.

contract permanently altering the constitution of a corporation not enforceable, 683.

when specific performance of an obligation created in violation of charter decreed, 684, 688.

C. *Contracts in excess of the charter voidable while unperformed, 685.*

D. *Innocent parties may charge corporation on contracts made in violation of the charter, 686-688.*

E. *Liability under executed contracts in excess of the charter, 689-706.*

[THE REFERENCES ARE TO THE SECTIONS.]

VALIDITY OF CORPORATE ACTS, — *continued*.

the principle of the liability under executed contracts in excess of the charter, 689-691.

the liability not based on the principle of estoppel, 692.

authorities in support of the doctrine, 692-698.

the English authorities, 705, 706.

conflicting authorities discussed, 699-704.

contracts made pursuant to unconstitutional charters, 694.

the doctrine applies to foreign corporations, 696.

executed contracts made by corporations under unauthorized partnership or consolidation, 697.

F. Validity of transfers of property involving unauthorized corporate action, 707-718.

questions of agency distinguished, 708, 708 *a*.

conveyances of real estate to corporations, 710.

conveyances of real estate by corporations, 711.

transfers of personal property, 712.

G. Obligations resulting from the performance of void contracts, 714-724.

• general principles, 714, 719.

liability for money or property received by agents under unauthorized contracts, 708, 715-717.

liability of municipalities for value received under unauthorized contracts, 718.

when a corporation may recover compensation for property transferred pursuant to an unauthorized agreement, 719, 720.

liability to account for anything received under an agreement void for illegality, 721, 722.

when no remedy will be granted, 723.

property acquired on joint account under illegal contracts, 724.

H. Liability of a corporation for torts, 725-734.

responsibility of a corporation for the torts of its agents, 725, 730.

liability to pay exemplary damages, 728, 729.

liability for criminal offences, 732, 733.

liability for contempt of court, 734.

ratification of torts, 731.

VALUE,

of franchises, 929.

of shares, 288, 826.

VALUE RECEIVED,

under void contracts, when compensation due, 714-724.

VEXATIOUS SUIT,

liability of corporation for, 727.

VIOLATION OF CHARTER,

does not discharge shareholders, 115-117.

remedies of shareholders, *see* SHAREHOLDERS, II.

[THE REFERENCES ARE TO THE SECTIONS.]

VIOLATION OF CHARTER, — *continued.*

effect on validity of corporate acts, see **VALIDITY OF CORPORATE ACTS.**

when a cause for dissolution, see **DISSOLUTION.**

VOID CONTRACTS,

distinguished from "voidable" contracts, 524.

VOTE. See MEETINGS.

who entitled to, 56, 483.

by proxy, 486.

number of votes of each shareholder, 476 a.

personal interest of shareholders does not disqualify, 477.

combinations among shareholders, 477.

assignee of shares without transfer not entitled to, 170.

shares belonging to the corporation cannot be voted, 478.

votes cast illegally, or for disqualified candidates; 485.

legislature cannot alter voting power, 1059.

remedy of shareholder to protect right to, 236.

W.

WAIVER,

of condition of subscription for shares, 91-93.

of lien on shares, 207.

of liability of shareholders, by creditors, 871.

of forfeiture of franchises, 1029.

WARRANTY,

of genuineness of certificate for shares by indorsement, 191.

WATER COMPANIES,

duties to the public, 1114, 1129.

WILLS, STATUTES OF,

applicable to corporations, 331-333.

WINDING UP,

discretionary power of majority as to, 413, 414, 417.

of portion of business, when authorized, 419.

when it is a duty, 412, 282-285.

remedy of shareholder to enforce, 282-285.

directors have no authority to direct, 513.

creditors cannot require, after consolidation, 956.

right of shareholders to distribution of assets, 415-417.

assets may be distributed among shareholders on books, 170.

equities among shareholders, 311-315.

rights of holders of preferred shares, 461.

after dissolution, 1036, 1037.

proceedings where liability of shareholders to contribute capital must be enforced, 311-315, 860-868.

[THE REFERENCES ARE TO THE SECTIONS.]

WINDING UP, — *continued*.

proceedings where individual liability of shareholders to creditors
must be enforced, 893-905.
rights of policy-holder in insurance company, 806 note.
under English Companies Acts, 859.
of foreign corporations, 988.
constitutionality of laws providing new remedies for, 1076, 1077.

WRITING,

necessary to subscription for shares, 69.
subscription for shares, proof of, 77.

60 90 170STQ2 53 004 7 BR

4863

Stanford Law Library
3 6105 06 053 809 2

